

EVALUATION OF MONTANA'S WATER  
RIGHTS ADJUDICATION PROCESS

Prepared for the Water Policy Committee  
of the Legislature of the State of Montana

by

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September 30, 1988

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September 30, 1988

Senator Jack E. Galt  
Chairman, Water Policy Committee  
Montana State Legislature  
Capitol Station, Room 432  
Helena, Montana 59620

Dear Senator Galt:

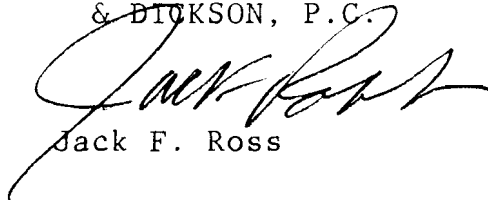
In accordance with our contract with the Water Policy Committee of the Montana Legislature, I transmit herewith the Final Report of our analysis of the Montana water adjudication system.

It has been a pleasure to have served the Committee, the Legislature and, ultimately, the people of Montana in that phase of our endeavor.

We look forward to the opportunity to work further with the Committee and the Legislature in providing counsel to them in the development of legal mechanisms for the attainment of their water policy objectives.

Very truly yours,

SAUNDERS, SNYDER, ROSS  
& DICKSON, P.C.



Jack F. Ross

JFR/emc

Enclosure

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## INTRODUCTION

In 1979, the Montana legislature enacted Senate Bill 76 into law. It provided a judicial mechanism for adjudicating water rights created through the application of water to beneficial use prior to July 1, 1973 as well as water rights claimed within Montana by the United States and the Indian tribes.

Senate Bill 76 was enacted in response to a perceived concern over the projected length of time and anticipated cost required to complete the adjudication process which had commenced in 1973 using an administrative agency mechanism. In the latter part of 1987, the Water Policy Committee of the Montana legislature called on us to evaluate the judicial mechanism set up by Senate Bill 76 to determine whether a number of concerns which had been raised about that institutional arrangement required correction by the legislature to assure the legal efficacy of the adjudication process.

While much of the controversy about the adjudication process seems to result from differing perceptions as to how well various participants in that process are performing their appointed roles, we were not asked by the Water Policy Committee to provide performance evaluations, but rather to address institutional issues. Our objective has been to evaluate those issues from the perspective of our extensive experience in the adjudication of water rights under a somewhat similar institutional arrangement.

In conducting our study, we have attempted to secure as much in depth information about the how the current system operates from as many of those who are involved in the process as available time and practical constraints inherent in the study process allowed.

Those constraints required us to limit the number of people we could personally interview to approximately 60 individuals. Those people were individual water users, including representatives of industrial water users, as well as representatives of agriculture and environmental organizations, individual legislators and other state officials, representatives of state and federal agencies involved in the process, tribal representatives, individual engineers and lawyers who have participated in the process, and the court personnel involved in the process, including water judges, masters and clerks.

In an attempt to gain as much professional input as possible, we were also able to conduct telephone or personal interviews of 11 from a list of 17 attorneys who have participated in the process. The information produced from those telephone interviews was further augmented by written questionnaires which were returned by 23 of the 34 attorneys to whom they were submitted. That survey is summarized in Appendix III.

In an attempt to gain a feel from the "customers of the system" as to how they perceive it to work, we also sent out over 1,000 questionnaires to water right claimants whose rights have been processed through the system, and 394 responded. The insights gained from those responses aided us in our evaluations. That survey is summarized in Appendix II.

We used the attorney and water user questionnaire procedures, not for the purpose of developing a statistically significant result (a purpose neither required nor possible under the study constraints), but rather as another tool to help us gain better insight into how well the system is perceived to be working by those segments of the Montana population.

Another and probably more important reason for using both the interview and questionnaire procedures was to help us more

clearly understand the real nature and significance of the institutional issues we were asked to look at. They have helped us prevent our study from becoming merely an academic inquiry into the niceties of esoteric legal questions of little practical value to a policy making, legislative body seeking to find out whether there are real, genuine institutional problems requiring legislative solutions.

Finally, we were greatly aided in developing a practical perspective of the process by our subcontractor, Wright Water Engineers, the engineering firm which developed "A Water Protection Strategy for Montana-Missouri River Basin" for the state of Montana in 1982. This firm was of inestimable value in providing us an independent objective evaluation of the accuracy of Water Court decrees and the Water Court/DNRC claims evaluation process.

In the presentation of our report we provide an Executive Summary of our findings, conclusions and recommendations. We then address, in the body of the report, each specific institutional issue as it was set forth in the detailed study design established by the Water Policy Committee on December 11, 1987.

## EXECUTIVE SUMMARY

We did not find the framework of the Montana Water Adjudication law or the process prescribed by it to be so grievously flawed as to require a massive legislative overhaul. We conclude that with some minor legislative fine tuning, the process now going forward under that law can be expected to achieve the results sought by the legislature when it adopted Senate Bill 76 in 1979. How rapidly that process can be concluded under the changes we recommend will become a function of the level of funding provided to both the judicial and executive branch institutions involved in the process.

A summary of our specific findings, conclusions, and recommendations, keyed to the study design outline, follows.

Proposed legislation recommended in this Final Report appears at Appendix IV.

A.1 The investigative functions performed by DNRC in aid of the adjudication process do not violate the separation of powers doctrine. The Water Court's direction to DNRC does not constitute an improper exercise of executive power by the judiciary.

A.2 We found no compelling legal requirement that the legislature act to reassign some of the multiple functions of the DNRC to some other executive branch agency.

A.3 The claims examination procedures used by DNRC both before and after the promulgation of the new rules by the Supreme Court have been adequate to provide reasonable evidentiary material for the Water Courts' use.

A.4 The DNRC claims examination process is efficient.



A.5 Claimants have adequate access to DNRC information.

A.6 Claimants generally perceive the DNRC process to be fair and designed to benefit all users.

B.1 We found no legal problem inherent in the use by the Water Courts of evolving or differing procedures and guidelines in the adjudication process.

B.2 In order to assure that decrees entered in individual subbasins be binding, not only within those subbasins, but throughout the entire river system of which they are a part, we recommend legislation to require notice of the issuance of those decrees to be provided throughout that river system.

B.3 We find no authority for the practice of decreeing late filed claims; the practice should terminate. We also conclude that users are not precluded by law from objecting to claims at the preliminary decree stage even where those claims were first evidenced in a temporary preliminary decree.

B.4 We recommend that the time for filing objections to subbasin decrees by affected water users in other subbasins of the stream system run for at least one year after the notice of the filing of such subbasin decree.

B.5 The supplemental notice and objection procedure we recommend will lengthen the time the adjudication process will take.

B.6 Claimants' access to Water Court decrees and other information is adequate.

B.7 The Water Courts are highly efficient in the adjudication of claims, providing adequate procedures for resolving disputed claims.

B.8 Credible arguments have been advanced that the Water Court structure violates the Montana constitution because the water judges do not stand for election as water judges. Equally credible arguments can be made that the structure is constitutional. In the absence of a definitive pronouncement on the issue by the Montana Supreme Court, we find no justification for the legislature to react by causing a wholesale dismantling or revision of the Water Court system.

B.9 The Water Courts' claim index and docket control systems are exemplary.

B.10 The Water Courts' method of requiring further proof of claims challenged by DNRC verification conclusions is adequate.

C. The current phase of the Montana statutory adjudication process is adequate to adjudicate federal and tribal claims under the McCarran Amendment and the various perceived shortcomings in the process involving the adjudication of state based claims do not threaten the utility of the process for McCarran Amendment purposes.

D.1 Neither the appropriation doctrine nor the present statutory procedure prescribe a universal, precisely measureable standard of accuracy for the entry of decrees evidencing water rights.

D.2 The present system provides ample opportunity for claims to be contested without the creation of a mandatory adversarial system.

D.3 The final decrees will be useful in the eventual administration of water rights in Montana.

D.4 Final decrees will be useful but not conclusive in equitable apportionment litigation or interstate compact negotiations.

D.5 We recommend the adoption of legislation to provide a method for correcting clerical errors in decrees.

D.6 The final Powder River Decree is not final and binding as against unadjudicated federal and tribal claims.

E.1 The conclusive abandonment of late filed claims is both legal and constitutional.

E.2 The "prima facie" evidence statute does not require amendment except to clarify its effect in light of our recommendation for legislation concerning administration of temporary preliminary decrees and preliminary decrees.

E.4 Under present statutes, only final decrees are administrable.

E.5 The 1986 Stipulation and Rulemaking have resulted in improved examination rules and procedures. The 1987 legislative changes have more clearly tied the adjudication's schedule to the level of funding of DNRC's verification activities.

E.6 Our recommended notice procedure will provide for effective integration of mainstem and subbasin decrees. See conclusion B.2 above.

## OVERVIEW

### A. THE ADJUDICATION PROCESS.

The perceived problems and our conclusions and recommendations must be viewed in the context of both the nature of the adjudication process and its results for the individual Montana water users and the state itself.

The adjudication process is relatively straight forward. Pursuant to public notice, all claimants of water rights created by beneficial use before July 1, 1973 were required to file written claims of those water rights with the Department of Natural Resources and Conservation ("DNRC") on or before April 30, 1982. Those written claims were submitted on forms prepared by DNRC which required a comprehensive description of the water right elements such as type and place of use, point of diversion, amount of diversion or storage, and priority date.

The claim filings initiated a process through which the Water Court, acting through its water judges and water masters, began the evaluation of claims within the hydrologic subbasins of the state. The state was divided into hydrological basins so that essentially all the claims for water from a defined regional source would be examined together and made the subject of one comprehensive decree. Because of the statutorily mandated abatement under section 85-2-217, MCA of judicial adjudication proceedings in subbasins where the federal government or Indian tribes claim noncompact reserved water rights, the adjudication was required to proceed with recognition of the many areas of the state in which adjudication proceedings are legally stayed.

In the evaluation of claims, the Water Court has recognized properly filed and completed claims as establishing prima facie

evidence of their contents. The information provided in a claim is supplemented in the Water Court's evaluation by submission of information by the DNRC, which has examined essentially all claims against available information at some level of inquiry.

The product of the Water Court's evaluation is the issuance of a preliminary decree containing the findings of fact and conclusions of law applicable to the claims in the water sub-basin being adjudicated and findings as to the elements of the claimed rights, including the claimants' identities, the amounts, locations, and priorities of use, and the points of diversion for the structures involved. Notice of the issuance of the preliminary decree is provided so that the claimants of water rights in the affected subbasin and other interested parties may review the decree and file objections to any claims decreed in the preliminary decree. The notice and objection period is 90 days unless the Court extends it to 180 days. Contested claims are resolved either through settlement or through litigation involving discovery of information by the contesting parties and a trial before the Water Court involving the presentation of proof and argument.

After all objections to a preliminary decree are resolved by the Water Court, the Court issues a final decree which is appealable to the Montana Supreme Court for alleged errors of fact or law.

The final decree of a water right claim is useful to the Montana water user because it evidences his property interest and defines its important elements: the amount, priority, type, and location of his use. Such confirmation of a real property interest in water can be useful in financing transactions and in assisting the user to receive his entitlement to water if competition for water intensifies and water rights are administered.

The final decrees for water rights also are useful to the State of Montana. The existence of such decrees will facilitate the orderly administration of water rights. Also, by providing benefits to the individual water users, the adjudications will provide greater stability to Montana's agriculture community. Finally, the decrees will provide evidence as to Montana's water use in disputes concerning interstate allocation of the surface waters which originate in Montana.

#### B. DUE PROCESS AND EQUAL PROTECTION.

It is in light of this process and the resulting benefits that we examine the important considerations of fairness and due process as they apply in the Montana adjudication.

When interested persons articulate many of their concerns about the adjudication process, they speak with catch words that include concepts of "due process" and "equal protection." It is imperative that the Committee understand what those concepts mean in the context of the Montana adjudication.

The principles of due process and equal protection of the laws are both contained in the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment prohibits federal deprivation of life, liberty, or property without due process of law, and the Fourteenth Amendment prohibits any state deprivation of the same.

Procedural due process concerns the fairness of a process or procedure used by the government to affect a person's life, liberty, or property. The minimal procedural safeguards required under the federal constitution require that an affected person be given notice of an intended action, that the person be given a meaningful opportunity to be heard about the matter, and that any decision about that matter be made by a fair and

impartial decision maker. Considerations of procedural due process only arise when a protected interest such as life, liberty, or property is involved. Clearly, water rights are recognized as real property in Montana, and their owners are entitled to due process in governmental actions affecting those property interests.

The requirements for notice and the nature of the opportunity to be heard vary according to the type of interest involved. The impartiality of the decision maker is a constant requirement.

Substantive due process and equal protection of the laws address whether the substance of a law, rather than the procedure employed to implement the law, is constitutional. Substantive due process requires that a law or procedure be reasonable in relation to the government's power to enact it. Equal protection of the laws protects against improper legal classifications which have the effect of treating similar people in dissimilar manners.

The major "due process" issue raised in the Montana adjudication involves procedural due process and the adequacy of the Water Court process to provide both notice and an opportunity to be heard. As discussed in the body of the report below, the issue is whether the statutory provisions as implemented through the Water Court's practices provide claimants and other interested persons adequate notice of the nature of claims and an adequate opportunity to file objections and to be heard about their claims and those to which they object.

The "equal protection" issue involved in the Montana adjudication involves the question of whether the application of varying and evolving water rights examination criteria and procedures unconstitutionally has treated similarly situated individuals in impermissibly dissimilar manners.

What the Committee needs to keep in mind when evaluating these issues is that neither the "due process" nor the "equal protection" principles exists as an abstraction in a vacuum. Both apply to real world conditions. They are invoked, when necessary, not by some third party who expresses concern that an abstract principle has been violated, but rather by the owner or claimant of a water right who can show 1) that there was, in fact, a failure of due process or equal protection, and 2) that such failure resulted in the loss or impairment of his water right. Anyone who could make such a showing would be entitled to judicial relief from that loss or impairment.

We emphasize that such relief comes about in our governmental system through a judicial, not a legislative, process. Legislative action becomes appropriate only when a flaw in a legislatively-created institution requires that a claimant be deprived of his due process or equal protection rights.

Our analysis of the Montana adjudication system revealed no institutionally-mandated procedure requiring the violation of due process or equal protection principles. As a result, if any due process or equal protection problems actually occur, it will not be because the system is flawed, but rather because some participant in the process causes the problem. Should that actually occur, the Courts are open to correct any such abuse, and we have seen no evidence to suggest that any Montana Court would shirk its duty in that regard.



## ANALYSIS

### A. DNRC ROLES, PRACTICES, AND RELATIONSHIP WITH THE WATER COURT.

Analyses of questions concerning the roles and practices of DNRC and its relationship with the Water Court in the adjudication process were central to our task.

#### 1. Separation of Powers.

The separation of powers doctrine, which is unique to the constitutional jurisprudence of the United States, was adopted by the people of Montana in their constitution. In order to assure that Montana's system of governmental checks and balances works, the doctrine of separation of powers requires that no one of the three branches of government may exercise the power granted exclusively to the other two branches of government.

The specific questions raised are (1) whether the DNRC, a department of the executive branch, unlawfully exercises a judicial power when it develops factual information under section 85-2-243, MCA to be used by the Water Court in the adjudication of pre-1973 water rights and (2) whether the Water Court improperly exercises executive power in controlling the activities of the DNRC under the same statute.

With respect to the first question posed above, we conclude that while such investigative activities may have traditionally been viewed as being exclusively within the scope of the judicial adjudicatory function, Montana case law indicates that the development of such information by DNRC and its use by the Court is appropriate and not constitutionally suspect.

Article III, section 1 of the Montana state constitution provides for the division of the power of the state government among three distinct branches, the legislative, the executive, and the judicial. It further prohibits any persons charged with the exercise of a power belonging to one branch from exercising any power properly belonging to another branch. Article VII, section 1 vests the judicial power of the state in the state Supreme Court, the district courts, justice courts, and other courts as may be provided by law. Under Article VI, section 4, the Governor is vested with the executive power to see that the state laws are faithfully executed.

Two general principles emerge from the judicial decisions interpreting the Montana constitutional separation of powers provision. First, the separation of functions of the three branches need not be absolute and exclusive, and some overlap of functions is permissible.<sup>1</sup> Second, if the performance of a legislatively delegated function can only result in the exercise of the judicial power through subsequent, independent action of the Court, the performance of the function is valid and does not violate the doctrine of separation of powers.<sup>2</sup>

Under these decisions, the Water Court's employment of DNRC to perform factual investigations appears constitutional. DNRC's investigations provide a source of factual information to the Water Court for completion of the adjudicatory process. The conclusions of DNRC's investigative inquiries are not binding on the Water Court or on the affected parties and therefore cannot be independently operative. The Water Court retains the ultimate power to make the factual findings from an evaluation of all the evidence before it, not just the evidence resulting from the DNRC investigation. The Water Court retains the discretion to make whatever findings from the evidence before it which may be required to pronounce final judgment as to whether or not a water right exists.

Addressing the question of whether the Water Court improperly exercises executive power in its control of DNRC's activities under section 85-2-243, MCA, we conclude that this control is within the bounds of the separation of powers doctrine.

The "judicial power is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."<sup>3</sup> The executive power is to "see that the laws are faithfully executed."<sup>4</sup>

Statutory law gives DNRC several roles in the water right adjudication process: as a claimant, as an objector, and as a claims verifier. Additionally, DNRC acts as the permitting authority for post-July 1, 1973 water rights.

In its role as a claim verifier under section 85-2-243, MCA, DNRC was given no independent, executive discretion to exercise. The statute provides that DNRC is to perform this function subject to the direction of the water judge. That being the case, faithful execution of the law by DNRC requires that it act at the direction of the water judge when performing the functions set forth in section 85-2-243, MCA. Since the Legislature gave the agency no independent executive discretion to exercise when performing that role, the Water Court's direction of the agency's efforts in such matters cannot be in violation of the separation of powers doctrine.

Thus, to the extent that the water judge directs the activities of DNRC in its performance of the functions enumerated under section 85-2-243, MCA, neither the water judge nor DNRC is improperly exercising or impinging upon the proper exercise of power belonging to the other.

Concern has been expressed that the Water Courts are attempting to or have attempted to totally control DNRC's "executive" activities in verifying claims. As discussed above, the direct response to those concerns is that the DNRC has no "executive" authority as a claims verifier and acts in that capacity only as an arm of the judicial branch. The Montana Supreme Court has adopted that analysis of the statutes in holding that DNRC has no independent executive authority under the claims verification statutes, and that DNRC acts at the direction of the Water Court.<sup>5</sup>

The Montana Supreme Court also observed that no factual record had been presented to it showing that the Water Courts were improperly attempting to exert control over activities of DNRC in areas where the Legislature had given the agency executive discretion, such as the functions of representing state interests as claimant and objector. In our investigation we found no such attempt at Water Court control of executive functions. It is clear from our reading of the law that if the Water Courts attempted to exercise such an impermissible control, DNRC could expect, upon making a proper factual record, to receive relief from such action by the Montana Supreme Court.

The Water Court has maintained a tight control over DNRC's activities in the verification process, but has not intruded into the DNRC's discretion and activities concerning its roles as claimant and objector in the adjudication. It appears that the Water Court's extensive, yet appropriate, control of DNRC in the verification process has generated an unfounded concern which is not substantiated when the facts are viewed in the context of separation of powers analysis.

## 2. DNRC's Multiple Roles.

Under a number of different legislative directives, DNRC performs a number of different functions affecting determinations of rights to the use of water. DNRC may act in its own right as an executive agency as a claimant of water rights or as an objector to water right claims of others. It acts for the Water Court in a judicial role as an examiner of facts concerning water right claims of others. Finally, it acts as the permitting authority for all post-July 1, 1973 water rights. As we understand DNRC's internal structure, each of those separate roles is implemented through a separate bureau consisting of individuals who do not consciously coordinate their activities or share information.

The specific question which we were asked to address is whether an impermissible institutional conflict of interest results from the various divisions of the DNRC exercising their discretion in the performance of the different roles assigned to the DNRC by the legislature.

Prohibitions against governmental institutional conflicts are addressed in article III, section 1 of the Montana constitution, which provides for the division of the power of the state government into the three branches, legislative, judicial, and executive. Separation of powers issues typically arise when the exercise of a power by an agency or department of one branch of government impedes the exercise of a governmental power belonging to another branch of government.<sup>6</sup> The separation of powers issue also may arise when an agency of one branch attempts to exercise the power properly belonging to another branch.<sup>7</sup> These separation of powers issues deal primarily with conflicts between government branches, not within a government agency.

In In Re Activities of the Department of Natural Resources and Conservation<sup>8</sup> it was argued that the various roles of DNRC as a water rights claimant, potential objector for state interests, and advisor to the Water Court give rise to potential due process objections because of institutional bias. The Montana Supreme Court was not required to dispose of that issue, but did note that the adjudicatory scheme in the state of Arizona had been upheld by that state's supreme court because the executive adjudicatory function was separated from the ownership function of the state.

Of particular importance to the Arizona Supreme Court was the fact that, although the Department of Water Resources (DWR) had multiple roles in connection with the adjudicatory process, DWR did not act as a participant, i.e., was not a claimant or objector. In contrast, the DNRC, in addition to its role as claims verifier, is a participant in the adjudicatory process. The separation of its various roles by bureau within the DNRC is therefore crucial.

In apparent recognition of the need to keep separate DNRC's various roles, the legislature provided the Water Court with authority to strictly control DNRC's investigative activities in order to ensure that the information so generated is used to assist the Water Court in its adjudication of claims and does not bleed over to benefit DNRC in its role as claimant or objector. Because of DNRC's multiple missions, it is important that the verification process conducted by DNRC as a judicial activity be thoroughly controlled by the Water Court. The Water Court has exercised pervasive control, obviously aggravating DNRC's perceptions of its executive prerogatives but, in our view, fully in accordance with the statutory scheme which separates the judicial function of claims verification from the executive functions of representing Montana's state interests as claimant and objector. Tight Water Court control

of DNRC verification, then, is essential in insulating DNRC from claims of institutional bias and conflict.

Judging the current institutional arrangement by principles in the applicable case law leads us to the conclusion that as long as the current practice of insulating one function from another continues, no legally prohibited institutional conflict of interest need arise. These multiple roles create no clear legal conflict when they are implemented through separate functioning units of attorneys, engineers, and staff.

It is clear, however, that the continuation of the present multiple mission directive to the DNRC could lead to mischief if the present departmental protocol for avoiding such problems were to change or fail. But even with that protocol in place so as to avoid a conflict in fact, the risk of the appearance of conflict will continue. That problem need not be so bothersome, however, because the appearance of conflict standards applicable to the practice of law do not apply to prohibit simultaneous implementation of multiple programs now required of DNRC.

Because of these considerations, we conclude that there is no compelling legal requirement that the legislature act to reassign one or more of the functions now performed by DNRC to some other existing or new agency in the executive branch. Rather, the determination of whether, as a matter of policy, such changes would be appropriate rests in the sound discretion of the legislature as it balances a need to avoid the risk of having a conflict in fact occur against the cost of making such a reassignment.

### 3. Adequacy of Claims Examination.

Questions have been raised as to whether the claims examination processes used by the DNRC since 1979 have been adequate

to provide the Water Courts with reliable verification evidence which those courts can use in completing the adjudication process. Such questions have been raised, in this context and others, because of a perception by some that a large portion of the more than 200,000 claims which had been filed may have erroneously claimed exaggerated quantities of water.

The instructions for the completion of water right claims which were provided to water users by DNRC and the Water Courts were comprehensive and, to anyone who is experienced in such matters, clear and understandable. Nevertheless, with so many thousands of claims being filed by claimants not experienced in such matters, it would not be surprising that many may have been confused about what to file for and how to complete the claim forms. Given the nature of human beings, undoubtedly some claimants could be expected to exaggerate their claims intentionally, while other exaggerations may have occurred through inadvertence or misunderstanding. However, we have not been persuaded from the evaluation of the available evidence including Wright Water Engineers' investigation, that there has been a deliberate, wholesale and pervasive exaggeration of claims. Even if there were, the claims verification procedures authorized by the statute and now implemented under Supreme Court rules can provide a tool for the Water Courts to use in correcting any excesses found to exist while processing and evaluating the validity of claims now before them.

Attached to this report as Appendix I is Wright Water Engineers' technical memorandum describing its investigations on this process and its conclusions on the issue of the accuracy of decrees and the claims examination processes.

We found that the claims examination process and procedures of DNRC, as they have evolved, are adequate to determine the existence and the nature of pre-July 1, 1973 appropriative water



rights. The data and standards on which a DNRC examination is based are probative of the existence and nature of such rights. They are the kinds of information which would be acceptable in a judicial proceeding as relevant evidence, and they are the kinds of data and standards that water right engineering experts normally utilize to determine the nature and existence of such rights.

The initial data sources used to verify irrigation rights are aerial photography, topographic maps, and the Montana Water Resources Surveys for the various counties. These data sources are utilized to determine points of diversion and the location and extent of irrigated land areas. DNRC assigns no particular weight or ranking to these various data sources and considers all data sources in verifying a claim. Thus, the use of post-1973 aerial photography to document pre-July 1, 1973 irrigation practices, while reasonable in itself, is balanced by the availability of the other data such as the county water use surveys which used many data sources, including field inspections and earlier aerial photography.

The increased contact with claimants to resolve verification questions and the increased use of field investigations under the new Supreme Court claims examination rules has improved the verification process. The question is whether the verification of claims under the original process (as evolved and amended until the promulgation of the new rules) was adequate to verify the existence and nature of water right claims. We believe that it was, when coupled with the judicial process established by the Water Court and the availability of objection to claims in the Water Court.

Any adjudication of water rights requires affected water users to appear and defend their interests. Montana's adjudication has followed that pattern, and significant modifications

of claims have resulted when objections are made. Given this process and our suggested remedial measures, we see no legal deficiency because all or most claims are not field investigated at state expense.

4. Efficiency of Examination Process.

We found the DNRC examination process to be efficient. The process is rational and progresses through reliance on the most probative available evidence before expanding the inquiry to additional sources, claimant contact, and field investigations.

The efficiency of the DNRC examination process results from three apparent factors. First, DNRC does not have a budget adequate to investigate every claim by thorough field examination within the time schedule for completion of the overall adjudication currently projected by the Water Courts. Consequently, DNRC has necessarily developed and implemented efficient practices. Second, DNRC's substantial experience in the Powder River Basin adjudication allowed it to develop an institutional perspective and approach to the most efficient utilization of available resources in carrying out its verification mission. Third, the new claims examination rules have essentially institutionalized an efficient and logical process for the examination of claims.

5. Sufficiency of Claimants' Access to DNRC Information.

We were asked to evaluate whether a water right claimant has sufficient access to the DNRC records to permit him to develop an informed determination of whether and how to deal with the information relating to his claim and whether to participate in the process of adjudicating the claims of others.

We found that water right claimants and the public in general have adequate access to DNRC records concerning water right claims. Microfiche copies of all claims are available in the nine field offices for public inspection. Hard copies of the basin decrees are available in the field office for each basin. Those copies are also available for the public in the district courts. Further, the Water Court has a microfiche and a hard copy file of all claims. Copies of DNRC records can be ordered by phone or correspondence at relatively modest cost.

Because of the number of claims involved and the inherent difficulties in organizing, maintaining, and updating information on claims for the entire state, access to information about claims may be difficult or confusing for some persons not comfortable with or confident in dealing with governmental systems. Thus, in individual cases persons may experience difficulty in accessing information. Nevertheless, based upon our understanding of the systems and capabilities of other jurisdictions, Montana's computer-based and professionally-staffed system is quite superior.

#### 6. Claimants' Perception of Fairness of DNRC Process.

We were asked to try to find out how various claimants perceive their treatment throughout the claims verification process.

The results of our interviews and surveys lead us to conclude that claimants predominantly perceive that they are being treated fairly by the claims examination process, including DNRC's activities. As might be expected, the spectrum of views held by claimants and their attorneys ranges from those who believe that the agency has been quite helpful to them in clarifying and correcting their claims to those who believe any DNRC inquiry is intrusive and unnecessary. Overall, however,

the claimants perceive that the process is fair and motivated by an intent to implement an accurate adjudication for the benefit of all water users.

Some state, federal, and private water interests have expressed concerns that while the majority of private claimants may feel they are being treated fairly, they are substantially unaware that other claimants of rights from common sources of supply may have filed inflated claims which might cause harm in the future after the adjudication process is completed. While these may be valid concerns, the limitation of water rights in future changes of use or in future modifications of facilities, as recommended in subsection D.1. below, can remedy much of the potential harm from erroneous claims. Moreover, the renote and additional objection periods for preliminary decrees, recommended in subsection B.2, will provide additional opportunities for investigation of claims by public and private interests.

#### B. WATER COURT PRACTICES AND PROCEDURES.

In addition to our inquiry into the practices and procedures of DNRC, we were asked to inquire into the practices and procedures of the Water Courts.

##### 1. Extent of Variance in Procedures and Guidelines Applied to Claims.

We were asked for our opinion as to whether the application of differing procedures and guidelines during the adjudication process may have created problems requiring legislative correction.

The procedures and guidelines utilized in the examination of water right claims have evolved continually and substantially

since the inception of the adjudication process. From August 1982 through February 1986, DNRC reports that 35 updates were made to the claims verification manual, including a total of 336 changes affecting the outcome of examination of claims.

While strict uniformity of adjudicatory guidelines and procedures may be desirable as a policy matter, such uniformity is not legally required in the adjudication process. This is because those procedures and guidelines serve only to provide a framework for the development of evidence and issues to be determined by the Water Courts in the adjudication process. The guidelines do not preclude submission of evidence to rebut the guideline. Thus, so long as all claimants are provided an opportunity to be heard in the presentation of their own evidence about their own claims and to rebut any evidence about their own claims developed by DNRC or others, there is no legal problem inherent in the use of the evolving or differing procedures and guidelines in the adjudication process. Due process is afforded parties. Similarly, so long as one who chooses to participate as an adversary in the adjudication of another's claim can be heard in the presentation of his evidence and arguments, he cannot complain of any lack of uniformity in the procedures and guidelines occurring in the process prior to his opportunity to be heard.

Procedures and guidelines utilized in the water rights examination have varied among and even within the various sub-basins which are the subject of issued decrees. If the legislature intended as matter of policy to have a single, universally applicable set of procedures and guidelines for the adjudication of all pre-July 1, 1973 water rights claims, that objective has not been achieved through the present process. As a matter of legal sufficiency, rather than policy, however, we conclude that the varying guidelines and procedures which have been applied in the development of relevant factual data need not create any infirmities in the resulting decrees.

DNRC has concluded that the application of the new Supreme Court examination rules in basins where examination under the old procedures was initiated but not completed will result in practical difficulties in the preparation of decrees for these basins. Consequently, DNRC has recommended that some partially examined basins be completely re-examined utilizing the new rules. We understand that the Chief Water Judge has entered an order directing DNRC to examine and re-examine four of these basins under the new rules. We assume that the Court will address any other problems or that appeals to the Supreme Court will do so. We find no issue here which requires legislative attention.

## 2. Adequacy of Notice of Adjudication Proceedings.

We were asked to determine whether the notice procedure followed under the present statute is adequate to satisfy the requirements of both state and federal law.

The principal mischief sought to be remedied by the adoption of the present adjudication procedure was to avoid the previously unsatisfactory partial adjudication of some rights on a stream system which was not binding on anyone not a party to that proceeding. The objective of the new procedure was to provide a vehicle for adjudicating all the pre-July 1, 1973 water rights in a stream system by means of a decree binding on the world. To achieve this result, it became necessary to provide a method for the court to acquire jurisdiction over all persons who may be affected by the adjudication. That method consists of the court providing notice, actual or constructive, of the pendency of the proceedings to all who might be affected thereby and providing them a reasonable opportunity to appear and be heard on the matters affecting their interests. Affected persons who have not been provided adequate actual or constructive notice of such matters would not be bound by an adjudica-

tion decree and the purpose of the statutory proceeding would be frustrated.

The applicable statute, section 85-2-232, MCA, provides for the issuance of notice of a preliminary decree. The receipt of such notice allows water users to investigate and object to claims of other users which may affect their rights. The statute as applied by the Water Court requires the Water Court to serve a notice that the preliminary decree is available on each person who has filed a claim of existing right within the same subbasin. The notice must also be served upon persons who have been issued or who have applied for permits as well as on those whose rights are based upon a federal reservation. Finally, the statute requires that the notice shall be served on "other interested persons who request service of the notice." Presumably, the latter provision permits any person to request and receive notice of the issuance of any preliminary decree.

The notice procedures required by the statute and followed by the Water Courts with respect to the adjudication of rights within each subbasin appear to be adequate to achieve the objective of the law within that subbasin, except that the 90-day objection period may be too short in some cases because of the number of claims decreed. As discussed below, a lengthening of the objection period is recommended. However, because a stream system is composed of a number of subbasins deriving their source of supply from the same stream or tributaries thereto, the question arises as to whether the statutory notice procedure is adequate to permit a claimant in one subbasin to receive timely notice of claims decreed in another subbasin which could affect his water right, so that he may have a reasonable opportunity to appear and to object to the rights decreed in the other subbasin.

The statute as applied provides no procedure for notice of the issuance of preliminary decrees to claimants outside a subbasin unless those claimants have, as "other interested persons," "requested service of the notice."

It is arguable that, because of the widely disseminated notice of the pendency of the adjudication proceedings throughout the state, a water right claimant in one subbasin could be held to have received constructive notice that rights in another subbasin possibly affecting his rights were also going to be adjudicated. Under such a theory, the affected claimant could request service of notice under the statute or be held to a duty to inquire about the status of the adjudication proceedings in other subbasins so that he could make a timely appearance in those proceedings to protect his rights.

Such a rationale would be analogous to the one that prevailed in Colorado prior to 1969. There, even though there was no procedure for the provision of actual notice among water districts (subbasins), the courts followed the constructive notice rule to make the decree in one water district binding on the owners of water rights decreed in another. But there, a claimant in one water district could challenge a right decreed in another water district by an independent proceeding outside the adjudication process if the action were brought within four years of the entry of the decree. After the expiration of the four-year period, no further remedy was available.

In our view, the situation in Montana is sufficiently different from that which obtained in pre-1969 Colorado to require legislative attention. Montana law does not require notice of a preliminary decree to be given to all potentially affected persons, and it contains no provision for post-decree challenges except for direct appeal of litigated issues. While the rights of downstream or upstream water users outside the subbasin may



be affected by the adjudication of priorities within the sub-basin, they are not provided with notice of the adjudication. Without such notice those other users outside the subbasin cannot be made constructive parties to the action and be bound by the decree within the subbasin.

To assure that the entry of adjudication decrees will be binding on all users in a river system in cases where decrees have already been issued, the law should be amended to require that objection periods be reopened for those decrees which currently are at the preliminary decree stage and for the current final decrees pursuant to notice provided throughout the entire affected stream system by newspaper or other media at least sufficient to constitute constructive notice for purposes of due process. Objections to any claim could be filed only by persons who did not previously object to that claim. Moreover, the statute should require that such a notice procedure be implemented for the issuance of all future preliminary decrees. This will require remedial legislation to provide for an additional or clarified notice provision dealing with the availability of preliminary decrees and extending the objection period for such decrees.

Final decrees are in repose and are binding as among all claimants within the subbasins which have been so decreed. If such decrees also were reopened by renote and an additional objection period, a judicial challenge to the need for any remedial notice could precipitate appellate review and a decision of the due process adequacy of the current notice procedure.

Except for the problem with notice as between related water basins, we find that the manner of notice is generally sufficient to satisfy both state and federal law requirements. While many of the issued preliminary decrees are extensive and involve

thousands of claims, the organization of those claims within those decrees is commendable. The decrees may be accessed by reference to particular source, owner name, location of point of diversion, or priority date. Thus, interested water users are not required to review the entirety of a massive decree to discover the nature of other claims which may require their investigation. If a user is interested only in a particular source, the inquiry can be narrowed by use of the appropriate index. Likewise, if a user is concerned only with priorities senior to a particular date, the index again provides a vehicle for limiting the scope of the investigation.

### 3. Late Claims and Objections.

As we report in subsection E.1., the statutory abandonment of water rights for failure to timely file claims is legal. The Water Courts have included in decrees water rights which were claimed after the filing deadline. The decrees apparently identify these as rights as having been filed late. We conclude that the decrees for these late-filed claims, if entered as final decrees, will be void as to those claims. For that reason, we believe that the practice of decreeing late-filed claims should terminate. Moreover, a Water Court's refusal to decree such a claim could provide the foundation for an early appeal to the Montana Supreme Court for a definitive disposition of the issue.

Montana's statutory law does not contemplate filing of late objections to a preliminary decree. The principle issue raised in regard to "late objections" concerns whether the Water Court's apparent practice of requiring that the claimants of water rights based upon state appropriation doctrine whose rights are included in a "temporary" preliminary decree must object to the claims of other appropriators after the issuance of a temporary preliminary decree and, if they do not object,

whether such claimants can be bound or precluded from objecting to claims included in the temporary preliminary decree when a preliminary decree is issued incorporating federal and Indian claims.

We are convinced that Montana law presently contemplates the entry of "temporary" preliminary decrees by the Water Court.<sup>9</sup> We have concluded, however, that there is no authority for using temporary preliminary decrees to achieve binding resolution of issues affecting state law-based water right claims prior to the entry of a preliminary decree. Such use of temporary preliminary decrees apparently is contemplated under Rule 1.II(7) of the July 15, 1987 claims examination rules, but it is not statutorily authorized.

Under the current statutory scheme, if a state law-based claim is adjudicated in a temporary preliminary decree, persons concerned with that claim legally can wait until the preliminary decree is issued concerning the claim before filing an objection. Such an objection should not be interpreted as a "late" objection on the basis that no objection was made to the temporary preliminary decree.

The legislature could, if it wished to do so as a matter of policy, consider changing the statutory process to expressly provide that temporary preliminary decrees can be issued and, pursuant to notice and objection process, result in binding determinations of state law claims. Consideration of both due process and equal protection would require that such legislation provide a mechanism which would authorize the filing of "late objections" to previously issued temporary preliminary decrees.

4. Sufficiency of Water Court Adjudication Schedule to Insure Due Process.

As set forth in subsection B.2., we believe that it is necessary and desirable to provide an additional notice and objection period for preliminary and final decrees. Because the objection period must be long enough to provide a meaningful opportunity to review and evaluate the decrees and file appropriate objections, the Water Court's existing time line for completion of all adjudications appears unrealistic. Because of these factors and others described under subsection D.4 of this report, we do not now see any special need to continue to expedite the process, but rather believe the state can comfortably afford to have it carried out at a more deliberate pace.

Because of the magnitude of the number of claims adjudicated in many subbasins, and because under a revised notice procedure water users may be obligated to examine and evaluate several decrees within the same relative time span, we recommend that the period for filing objections run for at least one year after the notice of availability of that decree.

5. Optimum Adjudication Schedule.

A modified notice and objection procedure lengthening the time for filing objections after the issuance of preliminary decrees and reopening existing preliminary and final decrees by additional notice and objection period will necessarily lengthen the schedule for completion of the state-wide adjudication. The process will be lengthened by several years.

In addition to the foregoing consideration, we expect that the implementation of the new claims examination rules will lengthen the time for completion of the entire adjudication. DNRC contacts with claimants to resolve questions about claims

and DNRC field investigations of claims will both increase under the new rules. Unless DNRC's manpower is increased, implementation of the new rules will lengthen the examination and adjudication process.

6. Sufficiency of Claimants' Access to Court Information.

Water right claimants generally have sufficient access to Water Court information. In particular, as described in subsection B.9., water right decrees are readily accessible.

There appear to have been problems in the past with the Water Court's refusal to disclose verification procedures and standards. The Water Court viewed questions about procedures and standards as an interference with its mandate to expeditiously adjudicate claims. Those problems now appear to have been resolved.

Concern has been expressed that the Water Court does not maintain an index of decisions or issues. Because of this, some litigants feel that they have been foreclosed from participation in decisions on issues which the Water Court may later apply to their claims. However, all litigants have an opportunity through the objection process and the appellate process to seek the correction of what they perceive to be errors of law or fact which may be applied to their claims. The fact that they may not have had an opportunity to litigate such issues with respect to claims of others does not deprive them of the right to litigate such matters fully with respect to their own claims. To date, major legal issues such as Water Court constitutionality, validity of late claims, and adequacy of notice have not been appealed to the Montana Supreme Court to provide case law guidance for future litigation.

## 7. Efficiency of Water Court.

The Water Court is highly efficient in the adjudication of claims. The Court has a well organized and dedicated staff which includes water judges, water masters and supporting clerical personnel. The staff meets frequently with the chief water judge and the other water judges to discuss the progress of the various adjudications and problem areas which require the Court's direction.

The objectives of the Water Court are simple: to expeditiously process claims and to enter decrees which accurately prioritize and quantify water rights in river basins or sub-basins.

To identify those claims which, because of irregularities or because of objections filed, require formal or informal hearings, the Court has devised an economical system of inquiry by telephone conference. Formal hearings are conducted, usually at the request of attorneys representing the claimant or objectors, or both. Formal hearings are generally conducted in open court. Rules of Civil Procedure apply but are not often invoked by the Court or the parties. Informal hearings are generally conducted by telephone conference. Most cases are processed by informal hearing procedures.

The adjudication process contemplated by the 1979 Act as well as the Water Court procedures envision claimants and objectors having the opportunity to adjudicate issues pro se. Lawyers are not excluded from the process, but the sheer volume of claims means that most claimants proceed through the water adjudication process without the assistance of legal counsel.

Claimant contact has been expanded under the examination rules promulgated by the Supreme Court. The Water Court staff

investigates claims whenever any element of a water right is unclear, questionable, or contains discrepancies. To assist the staff in identifying claims that require additional investigation, the Court, with the assistance of the DNRC, has established certain guidelines such as flow rates and volumes for water usage which, when exceeded by a claimant, automatically select that claim for further investigation. Although the guidelines may be somewhat arbitrary, they provide a guide for determining reasonableness of claims, and the claimant is provided ample opportunity to prove that he is entitled to adjudication of the claim as filed.

There have been over 203,000 claims filed, of which approximately 130,000 are in the process of being included in "temporary" preliminary decrees or preliminary decrees. Approximately fifty percent of all cases are settled by Water Court status conferences, which are conducted principally by telephone. Tapes of these conferences are maintained, and the quality of the tapes listened to appears to be good. If the cases are not settled at status conference, then a hearing is scheduled and those proceedings are also taped.

The chief water judge assisted in the preparation of forms utilized by claimants and objectors in the adjudication process. The forms and instructions for completion of the forms are expressed in "lay" terminology as much as possible.

In conclusion, we cannot suggest any meaningful improvements in the Water Court's administration to increase its efficiency.

#### 8. Constitutionality of Water Court Structure.

A very recent law review analysis written by DNRC's chief legal counsel Donald MacIntyre<sup>10</sup> concludes that the Water Court structure is unconstitutional and that the past and on-

going activities of the Court are void for want of jurisdiction because water judges are not elected by Montana citizens. The arguments advanced in that article are credible. Other arguments supporting the constitutionality of the Water Court system are equally credible.

Unfortunately, the Montana Supreme Court does not have the power to provide an advisory opinion in response to an inquiry from the Committee or others as to whether the current Water Court structure is constitutional. Absent contested litigation, such as an appeal of a final decree bringing the issue of constitutionality to the Supreme Court's attention, the prosecution of a writ of prohibition challenging the Water Court's authority, or a declaratory judgment action brought to test the validity of an issued decree, the adjudication will be clouded by the potential for constitutional invalidation.

This problem arises from the fact that Montana's constitution and statutes provide for direct elections of district court judges while Montana law provides for the appointment of water judges. The question is whether the appointment of water judges violates the Montana constitution or conflicts with other statutory provisions requiring the election of district court judges.

The selection of district court judges is addressed in its entirety in article VII, section 8, which contemplates two means by which a person may become a district court judge. First, when a vacancy arises, the district court judge is appointed for his first term by nomination of the governor and confirmation of the senate. Thereafter, the district judge holds his office subject to re-election. Second, a candidate may file for election to the office of district court judge and run against an incumbent judge for that office.



Section 8 comprises all that the Montana constitution has to say with regard to the selection of district court judges, and it does not mandate election of district court judges in all circumstances. The process of selecting district court judges can be divided into two distinct processes: (1) the selection of judges, accomplished by nomination and confirmation or direct election, and (2) the retention of judges, accomplished by election. The process of designating a water judge conflicts with both of these processes, albeit in different ways.

Under section 3-7-201, MCA a water judge for each water division is to be selected by a committee composed of district court judges from all districts within the water division. The committee must select as a water judge either a district judge or a retired district judge, section 3-7-201, MCA, for a term of four years. Section 3-7-202, MCA. The water judge holds his office subject to redesignation by the selection committee. The use of the selection committee presumably permits the water divisions's judiciary to select from their ranks a water judge experienced in water issues.

Montana's statutes state that the water judge presides as a district court judge in and for each judicial district within the water division.<sup>11</sup> This statutory provision is the crux of the problem because of the divergence between Montana's selection processes for district court judges and water judges. If the water judge truly acts as a district court judge, the selection of a water judge by a judicial committee appears to conflict with the constitution. While the committee is limited in its selection of a water judge to district court judges or retired district court judges, the selection of a district court judge as water judge would not avoid the conflict since such a district court judge has been selected as a district court judge only for one of the numerous judicial districts in

the water division. Where a statute is in conflict with the constitution, the statute is void to the extent of such conflict.<sup>12</sup> The selection of a retired district court judge is a separate and more difficult question.

The statutory provisions for the selection of water judges also conflict with the statutory provisions for the selection of district court judges because section 3-5-201, MCA requires that all district judges be elected.

If the water court is found to be unconstitutional, then all of its past acts are void for lack of jurisdiction. This would invalidate all the past adjudicatory actions of the Court, including the evaluation of claims and the issuance of decrees. Thus, if the Water Court is invalidated and the adjudication must be reinitiated, a new court would have to evaluate from inception all of the claims which have previously been decreed. The reliance in such reevaluation on prior decrees or judicial findings would be highly questionable.<sup>13</sup>

In support of the Court's constitutionality, it can be argued that the Water Court does not act as a district court, that when the substance of its legislatively-created jurisdiction and powers are examined it is clearly a special court created by law, pursuant to article VII, section 1 of the Montana constitution, free from the requirement of election which attaches to district court judges.

The Water Court has jurisdiction over the adjudication of claims to pre-July 1, 1973 water rights, but its jurisdiction does not extend generally to civil and criminal matters like a district court. Regular district courts do not have jurisdiction to adjudicate water rights. Thus, for the statute to say that the water judge sits "as a district court judge" does not actually vest the water judge with the authority of a

district court judge in every judicial district in his water division. Rather, it confers jurisdiction only to address the adjudication of claims for water use. Thus, it can be cogently argued that the Water Court is a court "provided by law," as contemplated by Montana constitution, article VII, section 1, separate and apart from the district courts.

Moreover, the apparent inconsistencies between Montana's constitutional and statutory provisions for the appointment and election of district court judges and the statutes concerning selection of water judges possibly are reconciled by article VII, section 6(3) of the constitution, which states that "[t]he chief justice may, upon request of the district judge, assign district judges and other judges for temporary service from one district to another, and from one county to another." In addition, section 19-5-103(1), MCA provides that retired district court judges may be called into temporary service in the Water Court by the Supreme Court. Through article VII, section 6(3) of the constitution and section 19-5-103(1), MCA, district court judges and retired district judges are authorized to be appointed as water judges, if that position can be construed as a "temporary service" as a district court judge.

In State ex rel. Wilcox v. District Court,<sup>14</sup> the Supreme Court of Montana addressed the constitutionality of using retired district judges to alleviate the congestion in district court, stating that it

construe(d) Article VII, Section 6(3), of the Montana Constitution to include retired judges in the term "other judges" and to empower the Chief Justice, upon request of the district judge, to assign retired judges for temporary service to any judicial district or county in Montana. This provision is a constitutional grant of power exclusive of any statutory grant by the legislature.

The Wilcox court gave as examples of judges who were not elected a worker's compensation judge appointed by the Governor, judges pro tempore, and the water court judges. The Court stated that "[t]he fact that retired judge's terms as district judges have expired does not, in itself, disqualify them from exercising judicial functions."<sup>15</sup> Thus, the Supreme Court of Montana has held that the statute providing that judges of the district court must be elected does not overcome the constitutional power given the chief justice to assign retired district court judges to sit in temporary service for a duly elected district court judge. Therefore, the appointment of retired district court judges to the Water Court is not unconstitutional if the position involves "temporary service"<sup>16</sup> as a district court judge.

Mr. MacIntyre argues that service on the Water Court's bench should not be considered "temporary" service because the term of office of a water judge is specified by statute as four years, subject to reselection, and because the statutes seemingly contemplate an ongoing and permanent involvement of the Water Court in the DNRC permitting process and in the administration of final decrees. We have found no meaningful case law guidance on the issue of what constitutes "temporary" judicial service.

Courts are traditionally inclined to find laws constitutional if there are rational and credible grounds for doing so.<sup>17</sup> As the foregoing discussion indicates, there are several cogent arguments supporting the constitutionality of the Water Court. Thus, we cannot conclude, as does Mr. MacIntyre, that the Montana Supreme Court would find the Water Court structure unconstitutional. Accordingly, unless and until that Court so finds, we cannot recommend that the legislature consider a massive overhaul or dismantling of the Water Court system.

9. Sufficiency of Water Court's Claims Index and Docket System.

The Water Court's claim index system is organized to enable the Court, attorneys, claimants, and objectors to locate and find ample information regarding water right claims in the river basins being adjudicated. The indices are designed to facilitate locating water rights by source name, owner name, point of diversion, and priority date. The system is adequate to locate water rights and identify claimants.

Docket control is a function of the judicial system being dedicated to orderly adjudication of water right claims. The system which has been created by the Water Court is exemplary. The water judges, water masters, and clerical support personnel have frequent meetings to review specific cases and the status of all cases which have been assigned to the masters for adjudication. Considering that thousands of claims are pending, docket control and follow-through on the claims could be a model for other courts.

10. Water Court's Criteria for Requiring Further Proof.

The adjudication system designed by the legislature and implemented by the Water Court favors expeditious adjudication of claims. Claimants are presumed to file truthful claims. The criteria established by the Water Court provide standards (flow rate and volume limitations) to evaluate this presumption. The element of a water right most misunderstood by claimants is the volume or annual quantity of water used in the exercise of a water right. The DNRC plays a vital role in verifying the accuracy of claims where additional proof is required. Field investigations and discussions with the claimants usually identify the problem for resolution by the Court.

Under the new examination rules, technicians of DNRC at the field offices identify numerous elements of the water right, as identified in the Wright Water Engineers report (Appendix I).

The earlier verification process did not identify as many issues as the current examination rules; nevertheless, the verification process was directed at the most significant consumer of water in Montana, namely irrigation.<sup>18</sup> The criteria established by the Court with the assistance of DNRC described standards for acreage, flows, volumes and climate conditions. For example, the Madison Basin (41-F) described three climatic areas. Within each area the Court, with assistance of DNRC, assigned volumetric standards for flood, sprinkler, and water spreading irrigation. The Court correctly characterized "Standards" by defining a standard on July 26, 1984 as follows:

Standards have been used by the Water Court to aid in calculating flow rate, volume and other elements of a water right. These standards are guidelines only and can be modified to reflect an individual's own circumstances upon objection."

The specific standards or guidelines for the Madison Basin are as follows:

<u>Climate Area</u>	<u>Flow Systems (diversion ditch) Volume (AF/A)</u>	<u>Sprinklers &amp; Pumped Diversion Systems Volumes (AF/A)</u>	<u>Water Spreading Systems, Sub- Irrigation and Natural Overflow Volumes (AF/A)</u>
III	9.4	3.8	1.9
IV	8.5	3.4	1.7
V	7.2	2.9	1.4

The Court also included periods of use of water for the climatic areas as follows:

<u>Climate Area</u>	<u>Period of Use (month-day)</u>
III	4-15 to 10-15
IV	4-20 to 10-10
V	4-25 to 10-05

Other guidelines are described in more detail in Wright Water Engineer's report (Appendix I). DNRC and the Court concentrated, through the verification process, on verifying irrigation claims. Communication with claimants was not as extensive as it is under the new examination rules. The principal means of resolving deviations from the guidelines was for DNRC to identify on the computer-generated claim abstracts "gray area" remarks which could be resolved by the Court, claimant, or objectors. Under the verification process, the responsibility for resolving gray area remarks was left principally to claimants and objectors.

Under the new examination rules, "gray area" remarks are not used. Instead, DNRC technicians identify matters deviating from the standards by listing on the claims abstract "issue remark." It is the policy of the Court to "call in" on its own motion all "issue remarks" for resolution. This process involves the Court (Master), a DNRC technician, claimant, and any objectors.

#### C. McCARRAN AMENDMENT CONSIDERATIONS.

##### 1. McCarran Amendment Adjudication Issues.

A rather curious mystique about how the "McCarran Amendment" impacts the Montana water adjudication process seems to have come into being as that process has moved forward. We find it curious because the amendment itself was designed to provide a straightforward, simple solution to an unfortunate but simple problem.

The problem was that, because of the sovereign immunity of the United States, rights to the use of water claimed by the federal establishment under state law or federal law could not be adjudicated in state water right proceedings unless repre-

representatives of the United States waived the federal immunity to state court action and voluntarily subjected those rights to the jurisdiction of the state courts. As might be expected, no representative of the United States or of tribes claiming Winters doctrine rights was ever willing to voluntarily subject such claims to a state adjudication process.

As a result, prior to the McCarran Amendment, no state in which the federal establishment or the tribes claimed rights to the use of water could ever have a complete adjudication of water rights because there was no way the state process could identify and quantify those claims. For the public lands states of the west, where the federal and tribal establishments are the largest landowners, the situation became intolerable. No one could know whether his water right, once adjudicated in a state proceeding, had any usefulness at all so long as the specter of unquantified federal and tribal claims hung over his head.

To remedy this intolerable condition, congressional representatives of the western states persuaded the Congress to pass the "McCarran Amendment" in 1952. By its adoption, the Congress told the representatives of the United States that they could no longer hide behind the doctrine of sovereign immunity to prevent federal and tribal claims to water from being included in state adjudication proceedings if the United States was properly invited into those proceedings and if those proceedings were "\* \* \* for the adjudication of rights to the use of water of a river system or source, \* \* \*."

As might be expected, challenges to the use of the McCarran Amendment to get the United States into state proceedings have been raised in a number of cases. Those challenges have resulted in a body of law which interprets the intent of the McCarran Amendment and how the federal-state relationships are adjusted by its operation.



One challenge was based on a race to the courthouse theory. In Colorado River Water Conservation District v. United States,<sup>19</sup> the federal government had brought suit in the United States District Court for the District of Colorado against some 1,000 local water users seeking a declaration of the government's water rights, both those based on state law and those based on federal reservations. Following commencement of the federal suit, a defendant in that suit initiated a state water adjudication proceeding and, following the procedure provided for under the McCarran Amendment, served the United States therein. Thereafter, the federal district court dismissed the federal case on the grounds that the doctrine of abstention required deference to the subsequently initiated state court proceedings. The issue finally decided by the United States Supreme Court was whether the operation of the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the district court's dismissal of the case was appropriate. That Court held that the McCarran Amendment's consent to jurisdiction in the state courts did not deprive the federal courts of jurisdiction, but made the state court's jurisdiction concurrent with the federal court's in matters involving federal rights to the use of water. Even so, the Court approved the dismissal of the federal court proceedings on the basis of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."<sup>20</sup> The Court stated:

Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the Court first acquiring control of property, for the concern

in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. [Citations omitted.] The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.<sup>21</sup>

The Court recognized that Colorado's water adjudication statute established a "single continuous proceeding for water rights adjudication."<sup>22</sup> So, a race to the federal courthouse cannot defeat the intent of the McCarran Amendment.

Other challenges to the use of the McCarran Amendment have called upon the courts to determine whether particular state adjudication procedures are adequate to resolve the federal claims. Two of those grew out of two different adjudication procedures which had been used in the state of Colorado. We believe a brief review of those two cases will be instructive in analyzing how well the Montana procedure meets the McCarran standard.

In one of those cases, United States v. District Court for Eagle County,<sup>23</sup> the courts were called upon to determine whether Colorado's 1943 Adjudication Act proceedings qualified under the McCarran "river system" adjudication standard. Colorado's 1943 Act authorized adjudication proceedings by the various district courts for separate and distinct water districts (similar to Montana subbasins) encompassing only a portion of a stream system which was actually located within each water district. Proceedings held under that statute were challenged as not meeting the McCarran Amendment standard because

they did not encompass an entire stream system but only, as in Montana, a part thereof. In holding that the proceedings met the standard, the United States Supreme Court said:

Eagle River is a tributary of the Colorado River; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. . . . \* \* \* . . . We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act. . . . The 'river system' must be read as embracing one within the particular State's jurisdiction. . . .<sup>24</sup>

In 1969, Colorado replaced the 1943 Act procedures with a new adjudication system which abolished the water district concept. It placed jurisdiction for the adjudication of rights from a whole watershed in a single water court and changed the claim procedure so that an individual claimant could initiate proceedings to adjudicate his particular claim as against all other users, including the United States, within the watershed whenever he chose to do so. This procedure was challenged under McCarran as being piecemeal with claims being filed on a month-by-month basis and thus not the kind of unified proceeding required by the McCarran Amendment. In disposing of that challenge and holding that the 1969 Act procedures met the McCarran test, the United States Supreme Court in the case of United States v. District Court for Water Division No. 5 said:

The major issue--the scope of the consent-to-be-sued provision in 43 U.S.C. § 666--has been covered in the Eagle County opinion and need not be repeated here.

It is emphasized, however, that the procedures under the new Act are much more burdensome on the Government than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because

all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. . . .

\* \* \*

It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U.S.C § 666 contemplated. As we said in the Eagle County case, the words "general adjudication" were used in *Dugan v. Rank*, 372 U.S. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15, to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality; . . .<sup>25</sup>

Those decisions and the Colorado River decision were followed by Arizona v. San Carlos Apache Tribe of Arizona.<sup>26</sup> The San Carlos case involved a dispute over Indian water rights in both Arizona and Montana. In San Carlos, the United States Supreme Court reconfirmed the propriety, under the McCarran Amendment, of concurrent jurisdiction in both the state and federal courts, but then stated:

In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the district courts were correct in deferring to the state proceedings . . .<sup>27</sup>

The court then directed the federal district court to retain its concurrent jurisdiction but to stay further proceedings thereunder while the Montana proceedings went forward and so

that challenges to the adequacy of those proceedings could later be considered if necessary.<sup>28</sup>

2. Sufficiency of Montana Act Under McCarran Standards.

In response to the United States Supreme Court's invitation in San Carlos, proceedings framing such a challenge in Montana resulted in the opinion of the Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes.<sup>29</sup>

The state Supreme Court confirmed the Montana Water Use Act as adequate, on its face, to adjudicate both Indian and federal reserved water rights. In ruling on that question, the Montana Supreme Court concluded that under the Act the water courts could apply federal law to questions of beneficial use, diversion requirements, quantification, and priority dates, thus enabling a proper differentiation between Indian and federal reserved water rights and water rights based on state law. The court, obviously recognizing its general supervisory role in matters conducted by the judiciary, reserved judgment on the question of whether the conduct of the proceedings under this statute also met the Court's understanding of what adequate proceedings under the McCarran Amendment might be.

We thus have four pronouncements by the United States Supreme Court and one by the Montana Supreme Court which can be used to measure whether the present Montana statutory scheme meets the McCarran standard. In the three of the Supreme Court cases, the Court dealt with two different types of procedures in Colorado, one of which is very similar to the one now in use in Montana. Specifically, with respect to the Montana statutory scheme, we have the determinations in both San Carlos and Greely. Applying those standards in a consistent way requires us to conclude that the current phase of the Montana statutory process is adequate to adjudicate the federal and tribal claims under the McCarran amendment.

It is important to emphasize that none of the five cases we have described attempted to address or define "adequacy" in the context of substantive water law. Instead, because the McCarran Amendment is a procedural statute, those cases dealt only with procedural matters. This is most appropriate because if the proceedings meet the procedural adequacy standards, they will automatically provide remedies for correcting substantive errors if they occur and result in any impairment of the federal and tribal rights. We conclude that the Montana system makes such remedies available and unless and until the Montana judicial system fails to make those remedies meaningful by correcting any perceived substantive errors affecting federal and tribal rights, there can be no reason for the federal court to exercise its concurrent jurisdiction. We have no reason to believe that if substantive errors affecting federal and tribal claims should be committed by the water courts, such errors would not be corrected by order of the Montana Supreme Court in a properly prosecuted appeal to it.

We are not unmindful of criticisms of the process which are based on McCarran Amendment arguments.

One argument claims that the proceedings failed to result in a sufficiently accurate quantification of rights, including federal rights. As discussed in subsections A.3. and D.1. of this report, however, we have found that Montana's adjudication system, as implemented under both the old verification procedures and the new examination rules, has produced and continues to produce reasonably accurate determinations of water rights and that adequate remedies are available to address the inaccuracies which inevitably result in any adjudicatory process. We do not find that federal or Indian rights are disadvantaged by the adjudication in the state forum. Neither more, nor less stringent examination is accorded to appropriators of water rights under state law than that accorded federal and Indian

water rights. As such, the Montana adjudication system as implemented allows a comprehensive and adequate quantification of claims.

Second, it is claimed that the water courts' failure to further utilize the expertise of DNRC and to direct additional claims verification and reverification, together with application of the prima facie standard, unjustly places the burden on every party of examining all other claims to rebut the claims' prima facie validity. This is said to deny procedural due process to claimants who do not have the resources to adequately protect their rights and who receive disparate treatment at the hands of the court due to the lack of uniformity in claims examination procedures. As discussed in Overview section B and Analysis subsections A.3., B.1., and B.10. hereof, we find no constitutional due process or equal protection infirmity under the circumstances. We note, moreover, that this challenge goes to the basis of the procedure--that claim, objection and adjudication is so burdensome as to defeat due process. It is this very procedure, however, that the Montana Supreme Court has already found to be adequate on its face when measured against the requirements of the McCarran Amendment.

Third, it has been asserted that the adjudication process, as applied, contravenes the federal policy behind the McCarran Amendment of avoiding piecemeal litigation, because Montana's expedited adjudication fails to avoid tension and controversy between the federal and state forums and results in hurried and pressured decision making and confusion over the disposition of property rights, no different than would occur under piecemeal federal proceedings. It is also asserted that issuance of temporary preliminary decrees in streams with federal and Indian claims, subject to a later incorporation of the adjudicated or negotiated resolution of those claims, is not a general adjudication; rather, the court is proceeding to settle all non-

federal and non-Indian claims prior to and separate from a later incorporation of Indian and federal water rights. We do not find either of these arguments persuasive. As previously discussed, we do not find the water court's implementation of the statutes to provide an unreasonable means of determining water rights, particularly in light of the remedies available to address improper court conduct or inaccurate results. Nor do we find that entry of temporary preliminary decrees causes the adjudication to be "piecemeal." We note that Colorado River Water Conservation District v. United States<sup>30</sup> found Colorado's adjudication system to be a "comprehensive" as opposed to piecemeal one, even though it reached various claims on a month-by-month basis, because it was "inclusive[]" in the totality."<sup>31</sup> Any doubt as to the inclusiveness in the totality of Montana's adjudication process would be removed upon the full notice and opportunity to litigate all claims which should be afforded at the preliminary decree stage. This notice and opportunity to litigate any and all claims prior to entry of a final decree in essence makes everyone a party to the general proceedings, whether or not they have chosen to participate, and assures a comprehensive adjudication.

Like the quest for the Holy Grail, the search for an exhaustive list of substantive and procedural criteria that a state water rights adjudication must meet in order to become a "McCarran Act Adjudication" is doomed to failure. The continuation of critical introspection and public arguments about whether the Montana process meets such an elusive list of standards is a significant disservice to the people of Montana. This is so because the question of whether the Montana process meets whatever those standards may be has been definitively and affirmatively answered by the only two authorities that count: the United State Supreme Court and the Montana Supreme Court.



The United States Supreme Court, in directing that the U.S. District Court in Montana defer to the state court proceedings, recognized that the state system was better equipped to adjudicate the multitude of claims, including those of the United States (whether based on state law or federal law) than the federal court system. In the process, the Court recognized that the Montana system met the threshold requirements of the McCarran Act, i.e., the avoidance of piecemeal adjudication rights in a river system, the avoidance of inconsistent disposition of property, that the state system be comprehensive and ultimately adjudicate an entire river system within the state.

That Court premised its directive on an assumption, "... that the state adjudications are adequate to quantify the rights at issue in the federal suits . . . ." <sup>32</sup> The Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes concluded that the Montana process would adequately quantify the federal and tribal claims. That court did reserve judgment on whether the actual conduct of the proceedings would achieve that result, while clearly indicating that it is available to correct, on a genuine factual showing of need, any real, rather than perceived shortcomings in the conduct of the process which might prevent the adjudication from "adequately quantifying the rights at issue in the federal suit."

But the final proof of the pudding is seen in the fact that the United States is not seeking relief from the Montana Supreme Court or complaining to the federal district court that the Montana process is not working for federal claims. Instead it has filed, as we understand it, as many as 32,000 claims and 6,400 objections. The U.S. is participating in the state process both as claimant and objector; it is not boycotting the process.

3. Adequacy of Integration of Federal Rights.

This topic is addressed above.

4. Conflicts Between Montana Law and Federal Law.

This topic is addressed above.

5. Montana Adjudication Remedial Measures.

This topic is addressed above.

D. ACCURACY OF ADJUDICATION DECREES.

1. Accuracy of Final Decrees.

A lead question in the study design asks whether the adjudication process can be expected to result in "sufficiently accurate" final decrees.

The accuracy question was asked in light of assertions that the adjudication process has been abused by the massive filing of excessively overstated or "bogus" claims. On the basis of those assertions, it is argued that unless the legislature once again changes how the adjudication process must go forward, the process will inevitably result in the wholesale issuance of final decrees which are not "sufficiently accurate." As a consequence, dire results such as the loss of McCarran Act jurisdiction or the loss of litigation advantage in interstate equitable apportionment actions are predicted to occur.<sup>33</sup>

Some criticism of decretal accuracy is based upon the prevalent reliance on the old "notices of appropriation" filed in the late 1800s in the clerk and recorders' offices. These notices are thought to reflect exaggerations of flow rates and

mere plans for diversion rather than rights actually perfected by beneficial use.

Notwithstanding their limitations, the old notices often are the only currently available evidence of the original initiation of water rights which have not been the subject of earlier stream adjudications. They cannot be ignored, and the need to rely upon them is one of the prices in exact accuracy which results from adjudicating appropriative rights approximately 100 years after appropriative water use began in Montana.

Our study cannot confirm the validity of the claimed abuse of the Montana system.

At the outset of our study, we had hoped that our subcontractor, Wright Water Engineers, would be able to make an independent engineering evaluation of the correctness of the "bogus" claim assertions. Such an evaluation, we had hoped, would permit us to provide the Committee with a realistic determination of whether such a perceived problem actually existed, and if so, its nature and magnitude. It soon became apparent, however, that the budgetary and time constraints imposed on the study would preclude the subcontractor from developing sufficient field verified data to make any kind of statistically significant or meaningful analysis of the existence, nature or magnitude of such claims on a statewide basis. We were therefore forced to conclude that use of our subcontractor for what could only be token field verification could, at best, be counter productive in attempting to help the Committee understand whether the asserted magnitude of the "bogus" claim issue could be verified.

Moreover, we doubt that any one can reliably conclude that the system has been abused as charged without performing a statistically significant statewide field check analysis. Our

consultant advises that such a study should examine no less than 450 to 500 randomly selected claims at an estimated cost, to do the job properly, of \$4,000 to \$5,000 per claim. We have not been persuaded from what we have seen that there is any legal necessity to spend public money to make such an inquiry.<sup>34</sup>

Because of our extensive experience in the Colorado adjudication system, we knew that even attempting to achieve one hundred percent (100%) accuracy in the description of water rights created in the recent past, much less any created as long as 100 years ago, would be unattainable. We also knew from that experience and elsewhere that mechanisms for dealing with irrigated acreage and flow rate descriptions exist in every adjudication process. We therefore turned our attention to an analysis of the Montana process to examine and evaluate, to the extent possible, the efficacy of the mechanisms it provides.

The mechanisms available in the process, which remains a judicial one, include the use by the Court of the DNRC claim verification reports, optional field verification at the direction of the Court, and additional evidence presented by the claimant, if requested by the Court, or by adversaries if objections to a claim have been filed.

We understand the Water Courts now call claimants in for presentation of further evidence to resolve differences between the claims and the verification reports when those differences are flagged by "issue remarks" made by DNRC on the claims abstract.

At the preliminary and the temporary preliminary decree stage, the protest mechanism becomes available. Any other appropriator who believes a claim has been erroneously decreed may protest its issuance and set up an adversary proceeding in

which the accuracy issue may be litigated. If he fails to receive the corrective relief he seeks from the Water Court, he may perfect an appeal therefrom to the Montana Supreme Court based on whatever factual record he has been able to make before the Water Court.

All told, there are a total of six mechanisms available throughout the process which can be invoked to assure the accuracy of the descriptions of irrigated acreage and rates of flow of decreed rights. One, the DNRC claim verification, is mandatory. Two mechanisms, the call in of the claimant and the direction for a field investigation by DNRC, are available at the discretion of the water judge. Three such mechanisms, the objection, the protest and the appeal to the Supreme Court, are available at the discretion of other appropriators, including DNRC. Such a large number of corrective mechanisms would appear ample when compared with the Colorado systems, both pre-1969 and post-1969, which have never had a mandatory detailed claim verification procedure of the type in use in Montana but relied entirely on voluntary adversarial mechanisms as by objection or protest to force litigation over accuracy issues.

Critics of the process, however, charge that those mechanisms are not adequate to achieve "sufficient accuracy" because:

1. The Water Judges do not use the call in and DNRC field investigations often enough;

2. Neighbors are not policing neighbors through the objection process; and

3. The judicial system is too burdensome for affected appropriators to use.

Since we have been unable to confirm that the system has been subjected to widespread abuse, we have no basis for forming a judgment as to the validity of such charges. But we know from our experience in adjudicating water rights in a very similar system that the protest mechanism provides an effective tool for an appropriator to protect himself if he chooses to use it.

We have no doubt that use of properly conducted field investigations can provide an evidentiary foundation for the issuance of accurate decrees. However, the question which needs to be asked is what degree of accuracy is practicably attainable and at what cost to the State of Montana.

Our consultant, Wright Water Engineers, provides an engineering overview of how difficult it is to achieve really high levels of accuracy in water flow measurement in the report which appears as Appendix I to this report. Wright Water Engineers also points out why, because of wide variations in factors affecting irrigation practices such as altitude, soil conditions, cropping patterns and efficiency of conveyance systems, the use of an institutionalized rate of flow rule of thumb to judge accuracy is not realistic.

Even more significant in evaluating the practical realities of the problem is their recognition and confirmation of what we as lawyers working in the water right adjudication field have long known. We know that two competent, honest engineers who have studied the same irrigation system with the same care can and often do honestly differ in their conclusions by as much as thirty percent (30%). In our experience in contested water right matters, if two such engineers are as close as fifteen percent (15%) apart we consider that they have essentially checked each other with respect to accuracy.

In recognition of the uncertainties inherent in this imperfect field, we cannot advise the Committee that there is a legal standard which fixes the degree of accuracy required for water right decrees. We have not been able to find any reported case which purports to prescribe such a "sufficiently accurate" standard. Instead, the courts universally fall back on the general guiding principle that the water right be measured by the extent of actual beneficial use.

Nevertheless, the concern remains that the process may result in the issuance of decrees for more water than has actually been applied to beneficial use, along with the questions of how to avoid such a result or what to do about it if it does occur.

One suggested solution is for legislation to require more field verification, but perhaps less than what occurred in the Powder River effort. The legislature could, as a matter of policy, decide to embrace such a program with its attendant costs. In our judgment, such a course of action is not legally required to protect the viability of the Montana adjudication process.

Another mechanism to remedy the problem of decreed claims which exceed historical use could be to provide a forfeiture provision for the nonuse of decreed water. Typically, such provisions in other jurisdictions provide that a water right is forfeited to the extent that water available in priority is not diverted over a given period of time, such as five or ten years. This type of provision over time can remedy the mischief of adjudication of "inaccurate" claims.

One major limitation defeats the utility of a forfeiture provision in Montana. Forfeiture must rely upon records and evidence of nonuse. Montana agricultural diversions typically

are not measured at the headgate. This presents something of a problem in evaluating recorded historical use and a substantial problem when forfeiture is the effect of nonuse. Unless the legislature finds the problem so serious as to require the imposition of a measurement requirement on all diverters, a forfeiture mechanism would appear to be practically unrealistic.

As an alternative to such a program, we suggest to the Committee for its consideration a remedial mechanism which can be used if and when necessary to avoid the mischief which could result from someone attempting to expand the use of water in the exercise of a right decreed in excess of what actually historically has been beneficially used.

The remedial mechanism would consist of legislation prohibiting the owner of a pre-1973 water right from:

1. Enlarging the capacity of his diversion facilities;
2. Enlarging the capacity of his ditch or canal system;
3. Extending the length of his ditch or canal system; or
4. Increasing the acreage irrigated under his system

without first securing a permit from DNRC.

Such permits could be denied if any of the proposed work could result in the appropriator being able to expand the use of water DNRC found from a then current field investigation to have historically been made in the exercise of the water right.

Such a mechanism could prevent the expansion of water use under such a senior right and require the appropriator to secure a new permit for a junior right for his expansion. With



such a mechanism in place, a prospective purchaser would be on notice that he could acquire only the right to the historic level of depletion resulting from the use under that senior right, regardless of the rate of flow or volume set out in the decree evidencing it.

Other, junior rights on the stream could be protected from injury from excessive diversions in at least two ways. If a junior right is downstream from such a diversion, it receives the benefit of the enlarged return flows resulting from upstream diversions. If a junior is upstream and the senior right seeks to curtail the junior right so the senior right can make excess diversions, the junior can, by invoking the law prohibiting waste, lawfully decline to pass more water than is required to meet the actual historical beneficial use needs of the senior.

We suggest this remedial mechanism option to the Committee as a practical way to prevent decrees which may not be "sufficiently accurate" from being used to the injury of other water rights. One of its advantages is that it avoids wholesale costly field verification at the expense of the State of Montana during the present process while recognizing that expanded uses may never be pervasively attempted. It also recognizes that unless and until actual expansion and use under such senior rights are attempted, no real injury to junior rights can occur. Finally, it casts the burden of proving the right to receive such a permit on the appropriator who seeks to benefit from the terms of a decree which is not "sufficiently accurate," rather than on the State of Montana.

## 2. Desirability of a Mandatory Adversarial System.

It would not be desirable to establish a mandatory system for adversarial challenge of water right claims. It would be difficult if not impossible to statutorily delineate criteria

under which claims should be challenged by a mandatory adversary; thus, it would be necessary for a mandatory adversary to contest almost every claim. This would substantially erode the benefit of the prima facie evidence statute in completing the adjudication.

The new Supreme Court rules are perceived as providing an adequate process and criteria for determining the accuracy of claims. The DNRC examines and has examined every claim against some criteria, so in a sense there is a mandatory check on the accuracy of all filed claims. Moreover, DNRC in its capacity as an objector can contest claims. The real question is whether Montana wants to allocate the resources to permit DNRC to object to claims without fiscal constraint and with the effect of extending the adjudicatory process by probably tens of years.

### 3. Usefulness of Decrees to Water Users.

The final decrees will be useful to water users in the eventual administration of water rights in Montana. They will provide binding confirmation of the priority date of the water right, its point of diversion, and place of use.

As in other appropriation doctrine jurisdictions, the decree for a water right will not memorialize forever the diversion entitlement of the decreed rights. Historical use should remain a relevant consideration when decreed rights are changed to different uses and when rights are bought and sold by knowledgeable parties either for continuation of the historical use or change to new uses. Abandonment will remain a possibility notwithstanding that a water right has been decreed to be in existence as of July 1, 1973. These inherent limitations on the usefulness of decreed priorities arise from the very nature of the appropriative right and the fact that continued efficient and beneficial use remains the basis for the continuation and value of the water right.

4. Reliability of Decrees in Equitable Apportionment or Interstate Compacting.

The final decrees will be useful but not conclusive in equitable apportionment of water among states or in interstate compacting of those waters. In equitable apportionment litigation or interstate compacting it will be necessary to look behind the decrees to actual use, efficiency of the diversions, and the harm versus the benefit to users involved.

One of the earliest cases to discuss the conclusiveness of a properly decreed state water right in an equitable apportionment case was Hinderlider v. La Plata River and Cherry Creek Ditch Company.<sup>35</sup> The case was brought by a ditch company, alleging that the State of Colorado, through its state engineer and pursuant to compact, administered Colorado water in such a manner as to deprive the company of its decreed water rights. The U.S. Supreme Court noted that a state cannot claim entitlement to divert the whole of an interstate stream, regardless of any injury or prejudice to the lower state:

It may be assumed that the right adjudicated by the decree of January 12, 1898 to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.

\* \* \*

The decree obviously is not res judicata so far as concerns the State of New Mexico and its citizens who claim the right to divert water from the stream in New Mexico. As they were not parties to the Colorado proceedings, they remain free to challenge the claim of Ditch Company that it is entitled to take in Colorado all the water of the stream and leave nothing for them.

\* \* \*

Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.<sup>36</sup>

This approach also was taken by the U.S. Supreme Court in State of Nebraska v. State of Wyoming<sup>37</sup>:

The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State.

Most recently, the U.S. Supreme Court affirmed this stance in Colorado v. New Mexico,<sup>38</sup> a case in which Colorado brought an action seeking to divert water for future use from the Vermejo River flowing from Colorado into New Mexico. No water had previously been diverted in Colorado while New Mexico users had diverted for many years. New Mexico argued that the special master was required to focus exclusively on the rule of priority. The U.S. Supreme Court countered that argument as follows:

When, as in this case, both States recognize the doctrine of prior appropriation, priority becomes the "guiding principle" in an allocation between competing States. But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends "upon a consideration of the pertinent laws of the contending States and all other relevant facts."

\* \* \*

Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably required and applied." . . . Thus, wasteful or inefficient uses will not be protected. Similarly, concededly senior water rights will be deemed

forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence.<sup>39</sup>

In addition to these qualifiers on senior rights, the Court also stated that it is proper to weigh the harms and benefits to competing states. Noting that previous cases have established that a priority should not be strictly applied where it would "work more hardship" on the junior user "than it would bestow benefits" on the senior user, it found the same principle applicable in balancing the benefits of diversion for proposed uses against the harms to existing uses. The Court concluded:

We conclude, therefore, that in the determination of an equitable apportionment of the water of the Vermejo River the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both States and the balance of harm and benefit that might result from the diversion sought by Colorado.<sup>40</sup>

From the above, it is clear that adjudicated water rights are not absolute protection for those rights in an equitable apportionment case. Federal law prevails, and the law of the highest court indicates that while established priority will be useful, there are other areas of consideration including actual beneficial use, efficiency of diversion, and the harm versus benefit to the affected users. Because of the prima facie evidence value to claims pending issuance of final decrees, and because of the limitations of decrees in compacting and equitable apportionment discussed above, lengthening the adjudication process as recommended herein should not jeopardize Montana's interests.

5. Statutory Process to Correct Adjudication Errors.

Currently, there is no express statutory process to correct clerical errors in final adjudication decrees. Traditionally, a clerical error is defined as a mistake in the judgment as rendered which is apparent from the record or other evidence and which prevents the judgment as written from expressing the judgment as rendered by the court. In contrast, a substantive error involves a reasoned judicial decision which is correctible only through appeal based on error of fact or law.

It would be impossible to adjudicate so many thousands of claims without incorporating errors in points of diversion or places of use. Montana needs an express provision for the correction of clerical errors in its final decrees. It would be desirable to amend Montana's water statutes to provide expressly that clerical errors in final judgments may be corrected at any time on the motion of affected persons or at the instance of the Water Court and pursuant to such notice as that Court deems necessary. The requirement for notice must be evaluated on a case-by-case basis in light of the nature of the requested correction and the proximity of the point of diversion and place of use to other diversions. When a change in a decree point of diversion could affect the decreed rights of other diversions, or when a change in the place of use could alter the pattern of the returnflow of water for other rights, other users should be given notice of the requested correction and the opportunity to contest whether the error is in fact clerical or whether it implicates a substantive change of water right in which historical use and injury must be assessed.

The correction of substantive errors is possible under limited circumstances under Montana law. Rule 60(b), MRCP provides a mechanism whereby a final decree may be subsequently modified or vacated. The Montana courts recognize that "there

must be some point at which litigation ends and the respective rights between parties are forever established."<sup>41</sup> Rule 60(b), however, is an exception to this rule. Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) satisfaction, release or discharge of judgment; or (6) "any other reason justifying relief from the operation of the judgment." The rule goes on to emphasize that Rule 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . ."

The Montana courts have interpreted the "residual clause" as recognizing the inherent power of a court of equity to set aside judgments. Relief under Rule 60(b)(6) is subject to the requirement that the petition for relief be filed within a reasonable time. What is a reasonable time depends on the particular facts of the case and is addressed to the sound discretion of the court.<sup>42</sup>

Thus, the language of Rule 60(b)(6) vests power in the courts "adequate to enable them to vacate judgments wherever such action is appropriate to accomplish justice."<sup>43</sup> While this language may appear to permit the reopening of judgments of decrees in many circumstances, it requires a demonstration of extraordinary circumstances, other than the five enumerated in the Rule, which may justify relief.<sup>44</sup>

6. Effect of Final Powder River Decree on Unadjudicated and Noncompacted Federal Rights.

The Powder River adjudication was commenced in October 1973 pursuant to the Water Use Act of 1973. Declarations of rights were required to be filed on or before February 1, 1975. The

United States was not served by the state of Montana and thereby made a party to Montana's water rights adjudications until June 1979, after the cutoff date for filing declarations in the Powder River basin. In 1979, the Montana legislature stayed adjudication of Indian claims, and in 1981 the stay of all federal reserved rights claims was enacted.

Following extensive data collection and claim verification by DNRC water rights specialists, a preliminary decree was issued in May 1981 pursuant to the provisions of S.B. 76. This was followed by entry of a final decree two years later in May 1983. The final decree for basins 42I and 42J covers over 10,000 claims. Not covered therein, however, are certain Indian and federal reserved water rights claims in the Powder River below Clear Creek in basin 42J. The issue presented concerns the effect of the final Powder River decree on these unadjudicated and noncompacted federal rights.

We conclude that a decree which does not address Indian and federal reserved water rights claims fails to satisfy the requirements of the statute and is, at best, interlocutory in nature and nonbinding as a final adjudication.

It was the intent of the Montana legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. This includes the adjudication of Indian and federal reserved water rights claims as well as claims based on state law. The legislature thus provided that both preliminary and final decrees must be based on, among other things, "the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights."<sup>45</sup>



Hence, decrees which do not reflect consideration of Indian and federal claims, as compacted or as filed upon during the special filing period therefor, fail to satisfy the statutory requirements for entry of preliminary or final decrees, fail to constitute a "complete" or final adjudication, and are, at best, interlocutory in nature. It is our recommendation that, at such time when the Indian and federal reserved water rights may be incorporated therein, the decrees be noticed out as preliminary decrees and the procedural steps applicable thereto be followed.

E. ADDITIONAL QUESTIONS CONCERNING THE ADJUDICATION PROCESS.

1. Legality of the Conclusive Presumption of Abandonment.

We have concluded that Montana's conclusive presumption of abandonment of pre-July 1, 1973 rights is legal and constitutional. This issue is of concern because numerous water right claims were filed after the filing deadline and the Water Court has included such rights in issued decrees. Evaluation of this issue is complicated because the 1972 Montana constitution provides that existing rights to beneficial use of water are recognized and confirmed. As stated previously in our report in addressing the status of late claims, we have concluded that decrees for late-claimed water rights are void as to those rights.

The applicable statute, section 85-2-226, MCA, provides that failure to file a claim of an existing right before the statutory deadline establishes a conclusive presumption of abandonment of that water right. This statute actually works a forfeiture of a non-claimed water right regardless of the existence of non-use of water or intent not to use water. Failure to file a claim would work a forfeiture of a real property interest. The provision is constitutional, however,

because the Montana legislature provided for adequate notice of the filing deadline, because the duty to file a claim imposed by this statute was reasonable and designed to accomplish a legitimate goal, and the duty to file a claim to adjudicate a water right is a reasonable condition to be imposed on the retention and use of water rights.

There are two alternative ways to construe the purpose of section 85-2-226. First, the statute could be interpreted as creating an irrebuttable presumption of nonuse and the formation of an intent to abandon upon failure to file a claim before the statutory deadline. In the alternative, the statute could be interpreted as a forfeiture of property for failure to timely file a claim. The United States Supreme Court has developed different sets of standards for determining the validity of irrebuttable presumptions and forfeitures.

An irrebuttable presumption arises where a statute allows one fact to be conclusive evidence of another fact. Irrebuttable presumptions are generally disfavored by the law. In Vlandis v. Kline,<sup>46</sup> the U.S. Supreme Court struck down a statute as violative of the due process clause where the statutory presumption was not necessarily true and reasonable alternative means of making the determination were available.

Under section 85-2-226, MCA the fact that a person failed to file his claim prior to the statutory deadline establishes conclusively that he has abandoned his water right. If the statute is interpreted as creating an irrebuttable presumption, it could fail the Vlandis test because it is not necessarily true that those who failed to file a claim have abandoned their water rights by nonuse and intent to abandon, and because hearings could provide a reasonable alternative means to determine whether claimants have abandoned their water rights.

Section 85-2-225, MCA may properly be construed as a forfeiture provision instead of an irrebuttable presumption. The case of United States v. Locke<sup>47</sup> presented the United States Supreme Court with a situation similar to that presented by section 85-2-226, MCA. That case involved a challenge to section 314(c) of the Federal Land Policy and Management Act of 1976 (FLPMA) which provides that failure to timely file an affidavit of assessment work performed on a mining claim "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner." Locke's failure to meet this statutory deadline resulted in forfeiture of unpatented mining claims recognized as property interests entitled to due process protection.

In addressing Locke's due process challenge, the Supreme Court discussed both irrebuttable presumptions and forfeitures. Locke argued that section 314(c) created an irrebuttable presumption of abandonment. Abandonment requires the intent, while forfeiture requires only noncompliance with the law. Thus, argued Locke, Congress intended that failure to file was but one piece of evidence concerning the claimant's intent to abandon.

The Court held that section 314(c) operated as a forfeiture provision. The Court reasoned that if the conclusive presumption arising out of one's failure to file merely shifts the burden of going forward with evidence to the claimant to show that he intended to keep the claim, nothing conclusive is thereby achieved.

The Court addressed the issue of whether this forfeiture provision was constitutional, applying a three part test. First, was the duty imposed by the statute reasonable and designed to achieve a legitimate state goal? This question was answered affirmatively. The Court said that Congress may impose

reasonable restrictions to further legitimate legislative goals by conditioning retention of vested property rights on the performance of affirmative duties. This is particularly true, said the Court, where the interest is a unique form of property, such as an unpatented mining claim. The U.S. government owns the underlying fee title to the public domain and therefore maintains broad powers over conditions of land use and acquisition. The Court also found that the goal of the Act, to rid federal lands of stale mining claims and to provide current information on claims, was a legitimate goal and that section 314(c) was a reasonable means of achieving that goal.

Second, does the forfeiture result in a "taking" of private property without just compensation? The Court held that reasonable regulatory restrictions on private property rights do not "take" private property when an individual must merely comply with a reasonable regulation. "[T]his Court has never required [Congress] to compensate the owner for the consequences of his own neglect."<sup>48</sup>

Finally, does the statute provide constitutionally adequate process to alter substantive rights? Here, the said the Court, Congress provided constitutionally adequate process simply by enacting the statute, publishing it, and affording those within the statute's reach a reasonable opportunity to familiarize themselves with the general requirements imposed and comply with those requirements.

Having satisfied each of the three tests identified above, the Court determined that the forfeiture provision of section 314(c) is constitutional.

The language of section 85-2-226, MCA is almost identical to the language of section 314(c) of FLPMA. It provides that failure to file a claim by the statutory deadline establishes a

conclusive presumption of abandonment of a water right. The U.S. Supreme Court's reasoning as to the distinction between an irrebuttable presumption and forfeiture is equally applicable to section 85-2-226, MCA. The Montana statute is therefore properly construed as a forfeiture provision and is subject to the Locke three part test.

The filing requirement is a reasonable condition on retention of a water right. The state's power to impose reasonable restrictions is particularly broad in the case of unique forms of property. Pursuant to article IX, section 3 of the Montana constitution, all water in the state is the property of the state for the use of its people. The state therefore maintains broad powers over the conditions of its use. Further, the state has a legitimate interest in eliminating stale water rights, and a filing requirement is a reasonable means of achieving that goal.

Second, as a reasonable regulatory restriction on property, section 85-2-226 does not "take" private property without just compensation. The statute merely requires the claimant to comply with a reasonable regulation, and the government is not required to compensate an individual for his own neglect.

Finally, the Montana legislature provided a constitutionally adequate process in section 85-2-213, MCA. Notice of the filing deadline was not only published in every newspaper in the state, it was also mailed with each statement of property taxes in 1979, 1980, 1981 and 1982. This is significantly more process than the Court found to be adequate in Locke.

The forfeiture provision of section 85-2-226, MCA is constitutional.

Given our conclusion that Montana's forfeiture provision is valid and that decrees for late-filed water rights claims are void as to those late filed claims, the legislature could consider remedial legislation providing that late-filed claims may be adjudicated but shall have priorities junior and inferior to the priorities for all rights adjudicated for claims which were timely filed. Such claims probably would have to be made junior and inferior to rights permitted by DNRC prior to the effective date of any curative legislation. This legislation would ameliorate somewhat the harsh, albeit legal, effect of the conclusive presumption of abandonment.

We understand that the Water Courts soon will address this issue about the status of late claims. The Water Courts' decision, and any appellate review by the Montana Supreme Court, will affect the need for and nature of any curative legislation. Therefore, and because providing or not providing a curative process for late claims would involve a policy decision by the legislature, we have not offered any proposed legislation at this time.

2. Effect of the Prima Facie Evidence Statute and Need for Any Modification.

The prima facie evidence statute, section 85-2-227, MCA, provides that a claim of an existing right filed in the adjudication proceeding constitutes prima facie proof of the contents of the claim until a final decree is issued disposing of the claim. This statute provides certainty of claimed water rights until the adjudication process is finalized. This certainty assists water users, and it also assists DNRC in its evaluation of the availability of unappropriated water for permit rights.

The Water Court has applied the prima facie evidence statute by treating those water right claims as evidence adequate to

meet the burden of proof required to grant the claim unless other evidence rebuts the facts stated in the claim. Thus, if the contents of a complete water claim are not questioned through the DNRC verification process, which includes use of standard flow rate and other criteria, or rebutted through an objection by some other party, the water right is decreed as claimed.

The prima facie evidence statute could be interpreted as inapplicable in the adjudication process. Under section 85-2-231, MCA, a preliminary decree must be based upon the statements of claim, DNRC data, and additional data and information identified in that statute. Moreover, that decree is required to include all of the determinations, findings, and conclusions required for the entry of a final decree. In other words, the water judge is required to consider the claim and all data relevant to the claim which might rebut or supplement the claim. If, because of its consideration of the available evidence, the Water Court modifies the claim in the preliminary decree, does the claim retain independent prima facie validity?

The prima facie evidence statute serves two purposes which can be reconciled within the context of a conclusion that the prima facie evidence statute applies in the adjudication process. First, the statute serves the aforementioned purpose of providing certainty as to the nature of water rights during the pendency of the adjudication process. Since only a final decree is subject to administration under the current statutory process, there is useful purpose in having claims accorded prima facie effect until the entry of the final decree disposing of those claims, even if a preliminary decree is issued which modifies the claims.

The second purpose of the statute is to provide a proof process which can expedite the adjudication of thousands of

claims without the required presentation of testimonial and documentary evidence by each claimant.

We find no need to modify the statute as it applies to and in the adjudication. We do recommend modification to clarify that the statute applies in the adjudication and not in the administration of water rights decreed in a temporary preliminary, preliminary, or final decree. This modification is recommended for consistency with our proposal to make temporary preliminary decrees and preliminary decrees administerable.

3. Need for Additional Delineation of DNRC Responsibilities

We have not identified any need for greater statutory delineation of DNRC's responsibilities. Moreover, the new Supreme Court claims examination rules provide ample direction for DNRC's activities in support of the Water Court's adjudication.

4. Legal Effect of Decrees Issued by the Water Courts.

Under current law only final Water Court decrees are subject to administration. Such final decrees are subject to administration only by court-appointed water commissioners.

If the legislature desires to provide for administration of temporary preliminary decrees or preliminary decrees, the statutes would have to be amended to expressly make those decrees administrable either by court-appointed water commissioners or by another entity. In Appendix IV we offer recommended legislation to provide that such decrees can be administered through the current scheme involving water commissioners appointed by the district courts. To preserve that scheme while avoiding the risk of jurisdictional conflicts arising



between the Water Courts and the District Courts, it appeared necessary to provide in that recommended legislation for the removal of decretal enforcement powers from the Water Courts.

Montana has not yet provided a modern comprehensive and permanent water rights administration scheme through a bureaucracy of state water administration officials as some other appropriation doctrine jurisdictions have done. While there is currently no pressing state-wide need for such comprehensive and on-going water right administration, that need may very well materialize in the future. If, and when it does, we believe that legislature can deal with the matter in a timely fashion and in a manner which can best solve whatever real problems are found then to exist.

5. Effects of the 1986 Stipulation and Related Court Decisions and Rulemaking.

The obvious result of the 1986 stipulation and related court decisions and rulemaking has been the Supreme Court's promulgation of the new claims examination rules. These rules are perceived by almost all interested persons as providing an adequate process for the verification of claims by DNRC and the Water Court. The major perceived deficiency is in the perception that the rule should more specific as to the Water Court's procedures and, specifically, the manner in which the Court addresses and disposes of DNRC findings.

Given the nature of an adjudication of water rights on a case-by-case basis, we believe that it would be difficult, and possibly imprudent, to specify by rule exactly what the effect of DNRC findings should be and how they should be addressed by the Water Court as affecting the prima facie correctness of claims as filed. Certainly, a rule that DNRC findings contrary to a claim automatically rebut the prima facie evidence value

of a filed claim would be inappropriate. Prima facie evidence stands unless contradicted and overcome by other evidence.<sup>49</sup> The Water Court must decide in each case whether DNRC findings contradict and overcome the filed claim.

The Montana Supreme Court has not expressly approved the 1986 stipulation, and we are unable to conclude that it has implicitly done so. Thus, the stipulation must be viewed as a contract or an attempt at contract. It is questionable whether the Water Court has the capacity to contract with litigants concerning how it will proceed generically in an adjudication. Such an agreement would not be within the context of a pre-trial order or other court order entered under the rules of civil procedure which binds the court unless modified to prevent injustice.

The 1987 legislation (H.B. 754) also has affected or could affect the adjudication.

The first change of note effected by H.B. 754 was the modification of the process for selection of the chief water judge. The legislature at that time considered broadly the question of the water judge selection process. It did not modify the process to address the concern of Mr. MacIntyre and others that the nonelective process for water judge selection is unconstitutional. From this one could infer a legislative view of the Water Courts as courts "otherwise created by law" which are not "district" courts for which the appointive/elective process applies.

The second statutory change of significance, in our analysis, which was wrought by H.B. 754 was the legislature's directive that when DNRC's verification budget has been expended it is not required to continue verification activities at Water Court direction until an additional verification budget is

appropriated. Since verification is inherent in the Water Court's statutory process for issuing preliminary decrees, this statutory clarification means that the adjudication process will proceed on a schedule which is directly related to the legislature's funding of DNRC's verification role.

6. Integration of Subbasins by Notice of Mainstem Claims.

Our discussion in Section B.2. above, concerning the adequacy of notice of judicial proceedings, has addressed the question of the integration of subbasins by notice in those subbasins of claims made on mainstem rivers. We have recommended in that foregoing analysis that supplemental notice procedures be legislatively imposed to insure the binding effect of all subbasin decrees throughout the unified river system.

FOOTNOTES

1     See, e.g., Huber v. Groff, 171 Mont. 442, 558 P.2d 1124,  
1131 (1976); State ex rel. Judge v. Legislative Finance  
Committee, 168 Mont. 420, 543 P.2d 1317, 1322 (1975).

2     Linder v. Smith, 629 P.2d 1187 (Mont. 1981).

3     Id., 629 P.2d at 1194.

4     Art. VI, § 4 Montana Constitution.

5     See In Re Activities of the Department of Natural  
Resources and Conservation, 740 P.2d 1096 (Mont. 1987).

6     See, e.g., Schneider v. Cunningham, 39 Mont. 165, 101  
P. 962 (1909).

7     See, e.g., In Re Activities, note 5, supra.

8     See, note 5, supra.

9     While the Montana Code does not explicitly provide for the  
issuance of temporary preliminary decrees, sections of the  
Code make reference to such a decree. MCA  
§ 85-2-141(3)(a) provides that water for leasing under the  
State of Montana's water leasing program may be obtained  
from any existing or future reservoir in a basin  
concerning which a temporary preliminary decree has been  
entered, although no reference is made to the provision  
authorizing such a decree. Part (d)(i) of the same  
section also mentions that water may be leased from basins  
in which a temporary preliminary decree has been entered.

MCA § 85-2-321 addresses the suspension of applications  
acceptance in the Milk River Basin to protect existing  
water rights. Part 2 states, "After April 8, 1985, the  
chief water judge shall make issuance of a temporary  
preliminary decree in the Milk River Basin the highest  
priority in the adjudication of existing water rights  
pursuant to Title 85, chapter 2, part 2." Title 85,  
chapter 2, part 2 address the adjudication of water rights  
in general. Authority for granting preliminary and final  
decrees is found in this section, however, no express  
authority for temporary preliminary decrees is mentioned.

In the case of Department of State Lands v. Pettibone, 702  
P.2d 948 (Mont. 1985), the question of title to waters  
diverted on state school trust lands was raised. In its  
undisturbed holding, the court states:

[t]he Water Court system is charged with the final adjudication of water rights. Based upon the claims filed by users and appropriators, the court issues temporary preliminary decrees cataloging the various rights and priorities in the respective basin. All named or affected parties have at that time, an opportunity to object to the temporary preliminary decree. If no objections are raised, the temporary decree is made final. Objections are heard and adjudged by the Water Court, with the right of appeal to this Court.

702 P.2d at 952.

The Supreme Court of Montana seems to be confusing a temporary preliminary decree with a preliminary decree. MCA § 85-2-234 states that a final decrees will be entered affirming or modifying a preliminary decree.

Under the Definitions and General Powers of Courts, MCA § 3-1-113 states:

When jurisdiction is, by the constitution or any statute, conferred on a court or judicial officer, all the means necessary for the exercise of such jurisdiction are also given. In the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

This provision seems to authorize the Water Court to enter temporary preliminary decrees under its jurisdiction in adjudicating water rights.

- 10 "The Adjudication of Montana's Waters--A Blueprint for  
Improving the Judicial Structure," 49 MONT. LAW REV. 211  
(1988).
- 11 Section 3-7-201(3), MCA.
- 12 Montana ex rel. Haire v. Rice, 204 U.S. 291, 27 S.Ct. 281  
(1907).
- 13 See, e.g., Public Service Company v. Signs, 184 Colo.  
349, 520 P.2d 589 (1974).
- 14 678 P.2d 209, 214 (Mont. 1984).

15 Id. at 212.

16 See also In re Marriage of Manus, 733 P.2d 1275 (Mont. 1987); State v. Holmes, 687 P.2d 662 (Mont. 1984); State ex rel. Welch v. District Ct., 680 P.2d 327 (Mont. 1984).

17 Section 1-3-232, MCA, provides that "An interpretation which gives effect is preferred to one which makes void." Under this maxim, an interpretation which renders the statute constitutional is preferred over one which renders it unconstitutional. See also American Linen Supply Co. v. Dept. of Revenue, 189 Mont. 542, 617 P.2d 131 (1980) (statutory interpretation which gives effect is always preferred over an interpretation which makes the statute void).

18 There were no guidelines established for "other uses."

19 424 U.S. 800 (1976).

20 Id. at 818.

21 Id. at 819 (emphasis supplied).

22 Id. at 819-20.

23 91 S.Ct. 998, 401 U.S. 520 (1971).

24 91 S.Ct. at 1000-1001, 401 U.S. at 521-524.

25 91 S.Ct. 1003, 1004-1005, 401 U.S. 527, 530 (1971).

26 463 U.S. 545 (1983).

27 Id. at 570.

28 On remand, the Ninth Circuit stayed all proceedings in the federal actions in Montana pending the outcome of the state court proceedings. Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187 (9th Cir. 1983). The Ninth Circuit reserved certain questions for state court determination, including the question of the adequacy of the state proceedings to adjudicate the reserved water rights.

29 712 P.2d 754 (Mont. 1985).

30 96 S.Ct. 1236, 424 U.S. 800 (1976).

31 96 S.Ct. at 1247, 424 U.S. at 821.

32 Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

- 33 A part of our analysis consisted of a review of pleadings and exhibits filed in the matter of the motion of the U.S.A. for comparison reports and reverification, some of which are also before the Committee in the comments on our Draft Report by the Confederated Salish and Kootenai tribes.
- 34 See Wright Water Engineers' conclusions with respect to the Hydrometrics report on Basins 76K and 76E contained in Appendix I.
- 35 58 S.Ct. 803, 304 U.S. 92 (1938).
- 36 58 S.Ct. at 807-809, 304 U.S. at 102-106.
- 37 65 S. Ct. 1332, 1335, 325 U.S. 589, 627 (1945).
- 38 103 S.Ct. 539, 459 U.S. 176 (1982).
- 39 103 S.Ct. at 546, 459 U.S. at 184 (citation omitted).
- 40 103 S.Ct. at 548, 459 U.S. at 188.
- 41 In Re the Marriage of Doris v. Waters, 724 P.2d 726 (Mont. 1986)
- 42 Id.
- 43 Id.
- 44 Id.
- 45 Sections 85-2-231 and 85-2-234, MCA.
- 46 93 S.Ct. 2230, 2233, 412 U.S. 520 (1973).
- 47 105 S.Ct. 1785, 471 U.S. 84 (1985).
- 48 105 S.Ct. at 1799 (citation omitted).
- 49 Silver Jet Mines, Inc. v. Schwank, 682 P.2d 708 (Mont. 1984).

APPENDIX I

ENGINEERING EVALUATION OF WRIGHT WATER ENGINEERS



ENGINEERING EVALUATION OF ADJUDICATION DECREES,  
MONTANA WATER RIGHTS ADJUDICATION PROCESS

Prepared for:  
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September 1988

SECTION I  
INTRODUCTION

## SECTION I

### INTRODUCTION

Wright Water Engineers was retained by the firm of Saunders, Snyder, Ross & Dickson (SSR&D) in December 1987 to provide technical support and engineering consultation in the review of the Montana Water Rights Adjudication Process for the Water Policy Committee of the Montana State Legislature.

Wright Water Engineers was retained to assist SSR&D in data collection and analysis, in interviewing participants in the process, in advising on questions relating to accuracy of decrees and in assisting in report preparation.

A summary of our work is described below.

#### SCOPE OF WORK

The services of Wright Water Engineers commenced in December 1987. Our work has included:

1. Review of Montana adjudication materials made available through Saunders, Snyder, Ross & Dickson (SSR&D) by the committee staff and participants in the process.
2. Consultation with SSR&D on technical, engineering matters as the study progressed.
3. The provision of assistance to SSR&D in the preparation of claimant survey materials.
4. An evaluation of requirements of sampling for statistical reliability.
5. Review of all special documents, letters, orders and reports made available through SSR&D by the Water Policy Committee staff.
6. Review of Montana Water Resources Survey materials to determine their adequacy for use in verification process using the survey for Lewis & Clark County as a sample.

7. Study of DNRC verification process.
8. Review of claim adjudication forms for content adequacy.
9. Detailed study of June 1987 water rights report prepared by Hydrometrics of Helena, Montana.
10. Interviews in Helena of selected DNRC personnel.
11. Inspection of water right filing system at DNRC, Helena.
12. Analysis of questions on accuracy of decrees.
13. Preparation of this summary report.

#### Field Inspections

Wright Water Engineers originally contemplated performing several field inspection-audits for claim reliability checking. After commencing our evaluation of the adjudication process, we advised SSR&D that because of budget and time constraints associated with the study, the usefulness of performing any field inspections would be highly questionable. We, therefore, questioned the suitability of attempting to make any field inspections. As a result, SSR&D concurred with our conclusions, and WWE agreed to spend an equivalent amount of allocated time and budget on other portions of the Scope of Work.

Some of the reasons for recommending that field inspections not be attempted are as follows:

Field inspections, if performed, would necessarily be severely limited in number due to time and budget constraints. For a reliable and significant statistical representation of over 200,000 claims it might be necessary to field inspect from 450 to 500 systems in a carefully controlled random sample population.

The cost of conducting that number of competent, professional and reliable analyses could well approach two million dollars. This is because a valid, professional analysis to determine a reasonably accurate beneficial use flow rate and historic irrigated acreage cannot result from a casual visit or "windshield survey." Unless conducted thoroughly, the field inspections for determination of irrigated acreages and flow rate determinations can do untold harm by giving the appearance of accuracy not warranted by the level of effort made. Such an undocumentable appearance could result in unfounded conclusions being drawn from the investigative effort.

#### EVALUATION

Special attention has been given to the matter of claimed flow rates and irrigated acres for irrigation rights. Our evaluation has included the question of accuracy.

The DNRC guideline of 17 gpm per acre (26.4 acres/cfs) for irrigation is reasonable for purposes of identifying claims which deviate from the guidelines. The guideline, however, is not a standard which can be used as an exact or mathematical basis for measuring the degree of accuracy of decrees.

A hindrance to accuracy of flow rates in Montana is the general lack of headgate diversion measuring flumes. This cannot readily be overcome.

The Wright Water Engineers evaluation described in the following portions of this report results in the conclusion that the Montana adjudication system is not flawed, but is capable of doing a realistic job of coming up with reasonable results.

SECTION II  
CLAIM VERIFICATION/EXAMINATION PROCESS

## SECTION II

### CLAIM VERIFICATION/EXAMINATION PROCESS

Wright Water Engineers reviewed Montana adjudication materials made available by the Committee staff and participants in the process. This was coupled with interviews with DNRC staff.

Additionally, Wright Water Engineers used its long experience in adjudications and involvement in water rights disputes from other states where accuracy of flow rates and acreage were in contention. Work in other states has included Pecos River compact studies where two states were unable to agree on many matters related to water accounting and measurement. This experience helps to provide a broad perspective of what is reasonable when evaluating the Montana system.

In our professional judgement, the DNRC claim verification/examination process is a very thorough one. An outline schematic diagram of the process is presented in Figure 1 attached. This represents the process as it existed in January 1986 under the former claims verification process. The new claims examination procedure is enhanced from that shown to reflect improvements which evolved over time.

The formerly used verification manual and the current examination rules are detailed, specific and thorough. The verification procedures are basically standardized for all field offices. This contributes to statewide uniformity in claims verification.

For irrigation claims, the historic land irrigated prior to 1973 is delineated by the applicant on his claim form. In checking the irrigated acreage associated with the water right, the DNRC personnel utilize U.S. Geological Survey topographic maps, aerial photographs taken subsequent to 1973 and the Water Resources Surveys prepared and published by the State

of Montana. The Water Resources Surveys contain the history of land and water use, irrigated lands, water rights and other pertinent data coupled with township maps showing the lands irrigated from each source or canal system in a particular county.

The reports also summarize the number of irrigated acres at the time the report was prepared.

Most of the counties in Montana have a Water Resources Survey. The office files upon which the reports were based contains minute descriptions and details of each individual water right and land use. The report for Lewis & Clark County, describes the methods used in the survey. Mentioned is the use of complete aerial photographic coverage of this county. Use of aerial photography to evaluate claims is an effective means to verify irrigation acreages.

During the course of the adjudication process, guidelines and procedures have undergone an evolutionary process in an effort to improve the reliability and efficiency of the procedures. These changes have been compressed into a time frame of approximately 10 years.

We find, as professional engineers, that the DNRC verification/examination process is exemplary. It is better than the procedures used in the various Colorado general adjudications which provide the basis for water administration in that state.

The verification procedures were subject to numerous changes which were a part of an evolving improvement. In 1987, the verification procedure was replaced with the new Water Rights Claims Examination Manual. Wright Water Engineers believes that the changes in verification and examination procedures were appropriate and that they reflected normal and expected improvements. We also believe that the changed procedures do not result in a distorted treatment of claimants, but contributed to a more efficient process. Mainly, this is because early in the new process, claimant contact has increased. We find, that the DNRC verification/examination process is efficient, and well organized.



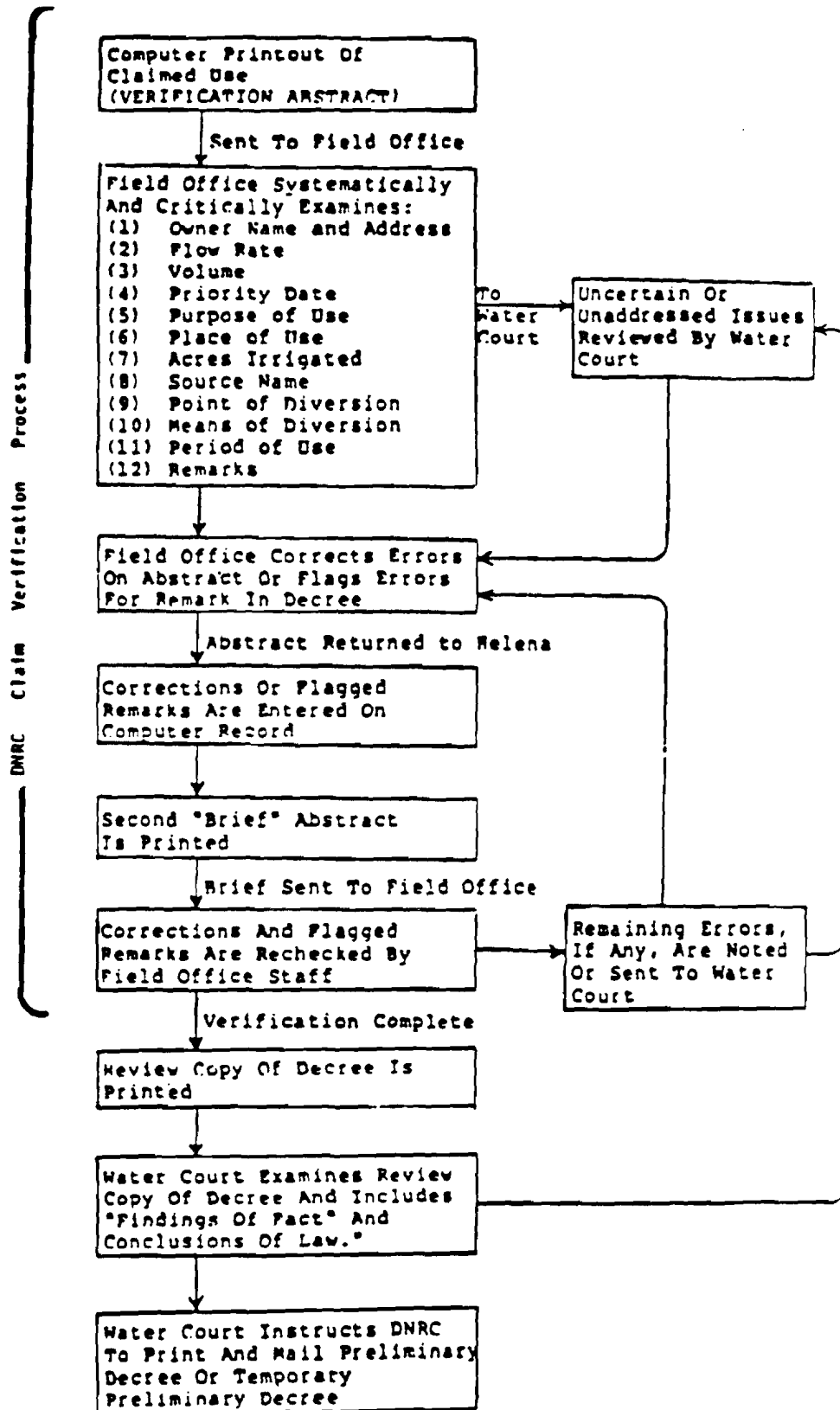


Figure 1. DNRC Verification Process Schematic

SECTION III  
ACCURACY OF DECREES

### SECTION III

#### ACCURACY OF DECREES

One of the most important features of our study was to attempt to determine whether, and the extent to which, the process might produce erroneous decrees legitimizing exaggerated water claims.

Accuracy of water flow rates and volume limitations used in the quantification of rights generally has been raised in the context of the degree of conformity to the institutionalized rule of thumb established by the DNRC and the variance from such guidelines which can reasonably be accepted as valid. The guidelines for irrigation flow rate is 17 gpm per acre. The examination guideline for domestic claims is 35 gpm. Other values are listed for different water uses. The "rules of thumb" help the DNRC and the Water Court to identify erroneous and exaggerated claims. They also assist in identifying claims which are too low, perhaps as a result of an error by a claimant.

As to irrigation water rights, the question of accuracy also applies to acreage of land historically irrigated.

For irrigation water rights there are 11 factors verified by DNRC as listed below.

- 1) Owner Name and Address
- 2) Flow Rate
- 3) Volume

- 4) Priority Date
- 5) Purpose of Use
- 6) Place of Use
- 7) Acres Irrigated
- 8) Source Name
- 9) Point of Diversion
- 10) Means of Diversion
- 11) Period of Use

By far the most significant factors among these are flow rate and acreage irrigated.

#### Flow Rate

To determine the proper flow rate, an engineer must study numerous factors associated with a particular system to determine the rate needed to satisfy the beneficial use for which the water is needed.

The flow rate of a water right is limited by beneficial use. The extent of a water right is such amount of water, by pattern of use and means of use, that the owner or their predecessors put to beneficial use. The proper flow rate is further limited by the historic capacity of the canal or pipeline system, regardless of the need for water.

A flow rate in a decree is the maximum flow rate. It may be needed for only ten days once each five, ten or twenty years, or more. The flow rate is not an average flow. The decreed flow rate provides a "cap", or maximum above which the divertor cannot take water even in the driest week of a severe drought year.

An institutionalized rule of thumb cannot be applied across the board because no two irrigation systems or agricultural fields are the same. No two system would beneficially require exactly the same flow rate or volume of water. From over 27 years of practical experience in the field, Wright Water Engineers has found that the rate of flow for an irrigation water right is quite variable, depending on the following variable parameters:

Climatic conditions: dry year, average year or wet year

Soil moisture

Soil type

Length of canal

Seepage of canal

Length of laterals

Seepage of laterals

Field percolation

Length of furrows or fields

Water table conditions

Recapture and reuse extent

Time of year and maturity of crops

The DNRC has established a guideline for irrigation which is reasonable. Nevertheless, many irrigation systems would typically have used more water than indicated by the guideline because of ditch seepage, low irrigation efficiency, permeable soils and other factors. The DNRC guideline of 17 gpm per acre cannot be used as an absolute standard because the allowed flow rate should be based on the amount required for beneficial use needs.

There may be concern that when all the flow rates in a particular tributary or river basin are added together there will be no water left for instream flows or water rights appropriated subsequent to 1973. Also, there may be concern that overstated flow rates will allow appropriators to expand their

use. An overstated flow rate in a water right decree does not give the claimant a right to use water in excess of that needed for beneficial use. In other words, the claimant does not obtain a right to use an exaggerated flow rate, to waste water, or expand historical usage.

It is erroneous for water resource engineers to aggregate flow rates decreed in a basin in judging stream water availability. Due to return flows, reduced diversions and the fact that burden on the stream is primarily measured by consumptive use, stream flow availability is best measured by stream flow records and/or observations of actual stream flow since 1973. The total of claimed flow rates is not a measure of whether appropriable water is available in a particular stream system.

#### Volume

The volume of water listed in an irrigation water right decree has been found not to be a significant direct flow constraint. For instance, in the event that an irrigation system, based on beneficial use, requires more volume of water than the volume stated in the decree, the beneficial use measure will control, not the decree.

Similarly, if the volume is overstated in the decree, the claimant does not become the beneficiary of the exaggerated amount.

#### Area Irrigated

The common method of measuring and estimating historic irrigated acreage is by using aerial photographs. An experienced aerial photographic interpreter can routinely estimate irrigated land to within 90 percent of accuracy if there are not interpretative complications such as two or more ditches irrigating the same area or if there are not wooded meadows.

Overall, we would expect an 85 percent level of accuracy to be reasonable and attainable, without field inspections, for historic irrigated acreage determinations given the source reference data available to DNR.

It should be noted that the temporary preliminary decree in Basin 76E (involved in the Hydrometrics Study) was found to have acreages awarded by the Water Court to be within 5 percent of the DNRC verified total acreage.

The measure of the value of a water right is the historic stream burden. For irrigation rights, stream burden is primarily influenced by two factors, area irrigated and crops grown. The reliability of the stated irrigated area is more important than either the flow rate or volume awarded.

Due to the fact that DNRC has at its disposal the county Water Resources Surveys, good aerial photographs from the late 1970's and aerial photographs utilized by the department and its predecessors for the Water Resources Surveys, the reliability of office verification of acreage can be expected to be good for most claims.

If an irrigator expands the area irrigated after 1973, this would not provide the appropriator with a pre-1973 water right claim for additional irrigation water.

#### General

Based on the Wright Water Engineers' experience with water rights in other states including Colorado, Arizona, Wyoming, New Mexico and Oklahoma, accuracy of decreed flow rate and volume of within 10 percent cannot be expected as measured against beneficial use.

The amount of time, manpower, resources and cost required to achieve a measure of accuracy of within 10 percent would be an economic burden of significant proportions.

In contested law suits regarding historic beneficial use, trustworthy and competent hydrologic engineers, after spending months analyzing a single irrigation system and spending far in excess of \$5,000, cannot be expected to agree closer than 20 to 30 percent. In fact, when opposing expert witnesses are within 30 percent, the basis is usually laid for compromise and a stipulated settlement.

Wright Water Engineers is of the opinion that the verification/examination process of DNRC is very good and results in a reasonable checking process. Wholesale field inspections would not necessarily result in increased overall accuracy of flow rate awards without a great expenditure of time and money. Wright Water Engineers believes this would not be cost effective.

Over a several year period, K.R. Wright served as technical consultant to the Special Master in Texas v. New Mexico, #65 Original. This case was administered directly by the U.S. Supreme Court. Our assignment, in part, was to assist the Special Master in resolving technical questions over various man-caused and natural stream depletions to the Pecos River. Disputes existed as to stream burden, flow rates, evaporation losses, seepage, volumes, groundwater flow, consumptive use and reliability of estimates of how much water should have flowed across the New Mexico/Texas state line.

The opinions of the experts for the two states typically varied more than 10 percent on matters of water engineering. The final report of the Special Master was approved by the U.S. Supreme Court in 1987.



Summary

The Montana water rights adjudication process, on the basis of our analysis, appears to meet reasonable rules for accuracy when compared to practices in other states and realistic consideration of the reliability of beneficial use, water flow rate estimation by appropriators and technical personnel of DNRC.

Questions remaining after issuance of the temporary preliminary decree should be resolved with court-ordered field inspections where appropriate, by reasonable negotiations or by litigation.

SECTION IV  
INDEPENDENT ENGINEERING AUDIT

## SECTION IV INDEPENDENT ENGINEERING AUDIT

The Water Policy Committee staff provided a copy of a report entitled "Evaluation of the State of Montana Water Rights Adjudication Process for Basins 76K and 76E of the Clark Fork River Drainage Montana." This report was prepared by Hydrometrics, a consulting engineering firm of Helena, Montana dated June 10, 1987.

The report was critical of the Montana adjudication process in the conclusions and findings, however, the report also presented a significant amount of water rights basic data which was useful to Wright Water Engineers in undertaking the assignment for SSR&D.

In analyzing the report prepared by Hydrometrics, Wright Water Engineers found that the accuracy of the temporary preliminary decree for Basin 76E was very good for land irrigated. Based on the sampled differences between the decree and the DNRC verified acres, the accuracy was 95 percent.

The flow rates listed in the temporary preliminary decree were analyzed for the same sample. Here, the variance was large with the Water Court granting 83 percent more than verified by DNRC.

The 83 percent difference is between flow rates for a limited water right sampling. The rights were selected because of obvious questions. Nevertheless, the type of irrigation practiced in the mountainous areas of Montana would routinely be expected to exceed a statewide guideline of 17 gpm per acre because of lower efficiencies of irrigation traditional to high altitude mountainous watersheds. In the Colorado mountains, a flow rate of 30 to 35 gpm per acre is regularly encountered in bona fide direct flow water right decrees. When excess water is applied to the land well in excess of the plant consumptive use of water, the excess water returns to the stream as return flow and is available for downstream water users.

BASIN 76E

While the Hydrometrics report covered two basins, 76K and 76E, the latter basin was described more completely. Therefore, Wright Water Engineers reviewed the data for Basin 76E.

Discussion of Sub-Basin 76E

In particular, Hydrometrics selected 61 irrigation water rights which were in excess of 2.5 cfs which appeared to be questionable as to either acreage, flow rate or volume listed by the Water Court in the temporary preliminary decree.

Of the 61 questioned temporary preliminary water rights studied in detail by Hydrometrics, the following statistics are noted.

1. For the Hydrometrics 61 studied acreages, the Water Court changed 22, 31 were verified by DNRC, and 11 acreages stand further checking.
2. For the studied 61 flow rates, the Water Court changed 16. It would appear that approximately 25 flow rates may be high and would be subject to further checking.
3. The 61 water rights selected included 16 previously decreed rights. Of the 16 previously decreed rights, the Water Court changed downward claimed acreages for 5 rights. The DNRC verified 13 of the claimed flow rates and showed 3 with smaller than verified flow rates. The Water Court changed one of the flow rates to meet the DNRC value.
4. While annual volumes of direct flow water rights are not considered too important in Montana, it appears that about 13 volumes be subject to refinement.

The statistics presented for sub-basin 76E are for 61 irrigation water rights out of 278 claimed and temporarily preliminarily decreed. The 61 rights studied represent 22 percent of the total claimed irrigation rights in 76E. Of 708 total claims the 61 studied rights represent 9 percent. The 61 rights selected were not a random sample, but a selected group for which flow rates and/or volumes were higher than the "standard". The acreage difference between DNRC and the Water Court total granted acreages was similar, i.e., within 5 percent.

Based on the Hydrometrics reported data, it would appear that there is not adequate evidence to conclude that the 76E temporary preliminary decree is unreasonable.

The overall level of "accuracy" of irrigated acreage is estimated at 95 percent by Hydrometrics. Typically, one might expect that an accuracy on acreage would not be better than 85 percent due to aerial photo distortion, irrigation acreage under trees, and the same land reported under more than one ditch.

#### SUMMARY

The review of Basin 76E water rights data indicates that for the non-random sample of 61 water rights selected by Hydrometrics because of flagged problems, the Water Court temporary preliminary decree would appear to be reasonable for a temporary preliminary decree.

The accuracy of the irrigated acres is 95 percent when measured against DNRC verified acreage.

The awarded flow rates for the questioned 61 water rights are 83 percent higher than the DNRC rule of thumb. However, high altitude mountainous irrigation throughout the western United States typically has a low irrigation efficiency. A flow rate of 30 gpm per acre is not unusual in any mountainous area. Excess water applied will find its way back to the stream for subsequent use.

In summary, it is the opinion of Wright Water Engineers that the data does not show that the Montana adjudication process is flawed. The temporary preliminary decree for Basin 76E remains open for further review and modification so that any exaggerated claims or errors can be corrected in the normal course of events.

## APPENDIX

## EXPERIENCE AND BACKGROUND

Kenneth R. Wright, P.E. is chief engineer of Wright Water Engineers. He has been registered as a professional engineer in Montana since 1968. His experience and background includes:

1. Engineer for the McElmo Creek Water Users Association in the Colorado River Basin to protest the first adjudication of water rights on McElmo Creek.
2. Technical consultant to the Special Master appointed by the U.S. Supreme Court for Texas v. New Mexico, No. 65 Original in regard to the Pecos River Compact. Services included resolving technical and factual disputes between the two states involving water use and water losses in New Mexico.
3. Engineer for public and private parties for appropriating and originating numerous water right claims for adjudication over a thirty year period.
4. Engineer for objectors in numerous water transfer cases where diversions, consumptive use, efficiency of irrigation and area irrigated were disputed.
5. General engineering supervision for preparation of report for Montana DNRC entitled "A Water Protection Strategy for Montana", 1983.
6. Principal in Charge for study and report for Montana Water Quality Bureau entitled "Urban Stormwater Quality Evaluation and Pollution Abatement Guidelines," 1979.
7. Project Manager for City of Helena drainage and flood control master plan.



8. Engineer for Adolph Coors Company on water rights and water development, including adjudication of numerous water rights and court testimony on complex water use claims and augmentation plans and assisting Coors' employees in the establishment of reports and record keeping to assure the State Engineer and the Water Court that Coors' decreed augmentation plan is administrable.
9. Appraisal engineer for water rights in Arizona for underground "water farms."
10. Engineer on numerous water projects in Wyoming, including assignments for State of Wyoming government, historic water use of ranches and design for municipal water systems.
11. Engineer for U.S. Department of Justice on condemnation of water rights for Chatfield Reservoir near Denver, Colorado.
12. Appraisal engineer for Arizona Water Company in a condemnation of water rights lawsuit.
13. Engineer for New Mexico interests in Federal District Court in El Paso v. New Mexico on interstate water transfer.
14. Engineer for Colorado Department of Natural Resources on Narrows Reservoir policy development.
15. Engineer for Exxon, USA on direct flow and storage water rights and water supply for Colony Oil Shale Plant and new Town of Battlement Mesa involving new water appropriations and adjudication engineering work.

16. Engineer for Western Sugar Company in Colorado and Wyoming on water rights, river erosion, waste management and water augmentation plans, including study of historic stream burden of water rights.
17. Provided technical services on numerous domestic well adjudications, reservoir filings, municipal water right claims and related court testimony.

## RESUME

**KENNETH R. WRIGHT**  
CHIEF ENGINEER  
WRIGHT WATER ENGINEERS, INC.

### EDUCATION:

M.S. Civil Engineering, 1957; B.B.A. Business Administration, 1951;  
B.S. Civil Engineering, 1951  
University of Wisconsin

### REGISTRATION:

Professional Engineer in the following states:

Colorado	Utah	Kansas	Arizona
Wyoming	Montana	Wisconsin	Oklahoma
New Mexico	Nebraska	California	

Member and Past Chairman, Colorado State Board of Registration for Professional Engineers and Land Surveyors, 1975-1984. Past Member, National Council of Engineering Examiners. Registered surveyor, Arizona

### CURRENT:

Serves as Chief Engineer for Wright Water Engineers in its general practice of water engineering. Includes hydrology, water supply, flood control and drainage, pollution management and design.

### TYPICAL PROJECTS:

Hydrologic Engineering. Prepared detailed hydrology studies and historic irrigation depletion analyses for numerous change-in-point-of-diversion lawsuits and augmentation plans including Adolph Coors Company, Arvada, Northglenn, Vail West Water and Sanitation District, and Snowmass Water and Sanitation District.

Water Engineering for Southeastern Water Conservancy District. Engineering studies and consultation, 1974 to present on 58 hydrologic assignments. Expert witness services in Division 2 Water Court. Prepared technical research and assisted in brief preparation with Mr. Charles Beise on Bessemer Ditch pollution suit referred directly to Colorado Supreme Court from Federal Court.

## RESUME

KENNETH R. WRIGHT  
(Continued)

### TYPICAL PROJECTS:

City of Beaumont. Engineer for drainage and flood control hydrology and planning for Beaumont, Texas.

Irrigation Engineering. Prepared detailed studies and historic irrigation depletion analyses for numerous change-in-point-of-diversion lawsuits and augmentation plans including Arvada, Northglenn, Vail West Water and Sanitation District, and Snowmass Water and Sanitation District.

Water Supply for Persian Gulf Oil Field. Planning and supervision of river basin studies, hydrology, facility design, economic feasibility and report to oil consortium for 500 cfs water supply from two rivers and Persian Gulf. Field work in Iran in 1972.

Hydrology Supply for Adolph Coors Company. Water supply engineering, 1963 to the present, including water rights engineering, water rights purchase recommendations, expert testimony, preparation of water augmentation plans, design and construction of four dams. Long-range planning and industrial water supply management.

Water and Sewer Design and Construction for EXXON, USA. Principal Engineer for planning, design and construction-supervision of utilities for new EXXON community to serve 20,000 people. Included hydrology treatment plants, pipelines, pumping stations, reservoirs, river water supply, and wells. Engineering for formation of district. Recent work includes handling of NPDES permit, and design of sewage treatment plant modifications to reduce power consumption.

Denver Metro Area Flood Control. Engineer on hydrology and preliminary design of 40 miles of South Platte River channel through Denver for the Urban Drainage & Flood Control District, 1983-1985.

Arvada Urban Drainage and Flood Control. Engineer and hydrologist on preliminary design of 13 miles of flood-prone streams in Ralston Creek Basin of the City of Arvada, Colorado.

Colorado Springs Urban Flood Channel. Engineer on Cottonwood Creek channelization in Colorado Springs, including lined channels and check dams.

Lena Gulch Urban Drainage. Supervision of resident engineering for construction of flood channel in Wheat Ridge, Colorado, through existing urban development.

Dam and Reservoir Planning for Water Supply and Storage Company (Irrigation Company). Company engineer, 1964 to present. Dam and reservoir planning, design, and construction, including 86-foot high Long Draw Dam (1966 to 1972) and Trap Lake II preliminary design (1981 to 1983). Analysis of feasibility, agricultural economics, and irrigation water requirements.

## RESUME

KENNETH R. WRIGHT

(Continued)

### TYPICAL PROJECTS:

City of Tulsa, Oklahoma. Consultant on drainage and flood control for city of Tulsa for design criteria, hydrology, master plan, and design of facilities. Presented lecture on floodplain management for U.S. Army Corps of Engineers, Tulsa District.

Drainage and Flood Hydrology and Engineering for Melbourne and Metropolitan Board of Works. Author of drainage and flood control manual, published in 1981, and of three urban drainage and flood control master plans for Melbourne, Australia.

Winter Park West Wellfield. Exploration, groundwater hydrology, well design, and construction, testing of seven producing wells from high mountain bedrock aquifer from 1966 to present. Two wells completed in 1983.

Surface and Groundwater Engineering on Rio Grande Compact. Responsibility for surface and groundwater studies in a dispute between Conejos River and Rio Grande water users over compact interpretations and water use. Testified as expert witness in trial in Division 3 Water Court in 1979.

Surface and Groundwater Engineering for Angel Fire vs. C.S. Cattle Company and Philmont Scout Ranch. Planning and design of surface and groundwater engineering studies for dispute over well use by large out-of-state developers on Canadian River basin of New Mexico. Analysis of injury to vested water rights 1979 to 1983. Testified as expert witness in Raton, New Mexico, District Court.

Principal Engineer for South Platte River Greenway Through Denver. Planning hydrology and engineering for ten-mile-long linear park development through Denver. Establishment of scope of project in 1972. Planning, design and construction each year through present.

Hydrology Design and Operation of Parfet Clay Pit Landfill for Adolph Coors Company. Engineering studies and evaluation of major industrial waste landfill, 1976 to 1983. Development of operational plan. Presentation of engineering testimony before regulatory body for permit. Solid wastes included potentially toxic leachate requiring lining, underdrains and operational restrictions. Handled landfill addition in 1985.

Urban Drainage and Flood Control Manuals. Establishment of drainage and flood control hydrologic and design criteria for Denver Metro area: Stillwater, Oklahoma; Helena, Montana; Gillette and Cheyenne, Wyoming; and Venezuela. Planning, design and writing of drainage manuals, including policy, regulations and design standards.

## RESUME

KENNETH R. WRIGHT

(Continued)

### TYPICAL PROJECTS:

Dam Safety Inspections. Hydrology and inspection of dams at St. Mary's Lake, Dukes Lake, Rolling Reservoir, and B-3 Reservoir, 1982. Cosponsor of Dam Safety Conference with Federal Emergency Management Agency, 1983. Assisted on preparation of legislation of dam safety for 1983 legislative session (HB 1296). Received award from Professional Engineers of Colorado.

Water Supply for Colony Shale oil Project. Analysis of water supplies, 1963 to 1983, including water right applications, historic irrigation burden, due diligence engineering, river transit loss studies, expert testimony, and groundwater development and planning.

Uranium Mine and Mill Engineering. Supervision of hydrology and water engineering services for Cyprus Mines at Canon City, Colorado; Urangesellschaft, USA Mine at Baggs, Wyoming; and Utah International Mine in Wyoming. Planning, design and supervision of groundwater field testing, baseline hydrology and water supply analysis, mill-tailing leachate evaluation, dam failure analysis, dewatering of pit, effluent treatment, computer model studies of groundwater drawdown, reclamation and solute transport modeling. Cyprus Mines engineering included five separate aquifers in pit area, extensive permit application work with agencies, and responsibility for preparing environmental impact statement for Nuclear Regulatory Agency.

### OTHER EXPERIENCE:

Managing Partner, Wright-McLaughlin Engineers, 1964-1982. Dissolved firm in 1982 to apply full time to Wright Water Engineers and reduce engineering administrative duties.

Partner, Wheeler and Wright, 1959-1961. Partnership in consulting engineering firm practicing in the field of hydrology and water supply.

Hydraulic Engineer, U.S. Bureau of Reclamation, 1957-1958. Hydrology and hydraulic engineering in Project Investigation Branch of Chief Engineer's Office on sedimentation, water surface profiles, Rio Grande channelization, and flood studies. Participation in USBR publication Design of Small Dams. Received Secretary of Interior's Gold Medal of Valor for action on the Rio Grande River.

Research Associate, Groundwater, University of Wisconsin, 1956. Electric analog and hydraulic modeling and report on toxic groundwater pollution of Wisconsin River aquifer.

Arabian American Oil Company, 1951-1955. Construction engineering in Saudi Arabia on housing, utilities, oil pipeline under Persian Gulf to Bahrien Island; Trans-Arabian Pipeline cathodic protection; and pipeline from Ras Tamura to Ras El Mishaab.

## RESUME

**KENNETH R. WRIGHT**  
(Continued)

### PROFESSIONAL SOCIETIES:

American Society of Civil Engineers, Fellow  
Hydraulics Group, Colorado Section  
Chairman - 1962  
Cooperation with Local Section, Sanitary/Hydraulics Division  
Chairman - 1967  
Surface Water Hydrology Committee, Hydraulics Division  
Chairman - 1968-1969  
Finance Committee, Hydraulics Division Conference, Madison, Wisc.  
Chairman - 1956  
Executive Committee of Hydraulics Division, 1971-1973  
Chairman - 1973  
Urban Hydrology Research Council, 1970-1985  
Engineering Foundation Research Conference, Urban Water Resources  
Management, Co-Chairman - 1970  
Task Committee on Design of Detention Outlet Works 1983-1984  
Storm Drainage Manual, Author of Conceptual Design Chapter, 1983-1987  
American Consulting Engineers Council, Member  
National Director - 1966-1968  
President - 1969-1970  
American Water Works Association  
Regional Conference Technical Program Chairman - 1966  
National Water Rights Committee, Chairman - 1982 to the present  
Rocky Mountain Center on the Environment  
Director - 1969-1970  
President - 1971-1973  
National Society of Professional Engineers, Member  
U.S. Committee on Irrigation, Drainage and Flood Control  
Executive Committee - 1978-1985  
American Water Foundation  
Founding Member, Board of Directors  
Director 1983-1987

APPENDIX II

RESULTS OF WATER RIGHTS CLAIMANTS SURVEY



## APPENDIX II

### RESULTS OF WATER RIGHTS CLAIMANTS SURVEY

After our initial discussions with the Committee and our initial interviews, we determined that a sampling of the views of selected water rights claimants would be useful. We worked with DNRC's adjudication unit to extract from its computer data a cross-section of water right claimants who filed claims in the adjudication for uses reflective of the major use types identified by percentage by DNRC. These claimants were selected sequentially rather than in a pure "random" manner because of time and cost constraints required to produce a true random survey, as that concept is recognized by polling experts. The selection was "blind," however, and the survey was tabulated on an anonymous basis.

The survey results should not be over-emphasized because of the limited scope and nature of the survey. A total of 1,002 surveys were distributed, and 394 were returned completed. Because of past limitations on the updating of claimant addresses, a substantial number of surveys were not deliverable. Also, because of cost considerations, we were unable to engage in telephone follow up generally required by pollsters to reach statistically meaningful conclusions.

Following is a reprint of the Water Rights Claimants Survey with the received responses tabulated on the form. Noting the qualifications on this survey, we suggest the following major conclusions:

1. A number of claimants have based their claims on post-July 1, 1973 water use. In this survey, approximately 8% of the respondents reported that their claims were based on such prospective use.

2. There has been a substantial reliance on the old "notices of appropriation" filed with the county clerk and recorders' offices in filing claims.

3. The majority of claims have not been objected to by other users, and this is consistent with the finding that the majority of users are not aware of the nature of rights claimed by other users from the same source.

4. Approximately one-half of the claimants who have been involved in Water Court hearings have retained legal counsel to represent them.

5. Claimants overwhelmingly report adequate notice of Water Court proceedings.

6. Over one-half of contested claims have been modified by agreement.

7. Few of the contested claims have so far been modified as to priority date, place of use, or type of use.

8. A substantial number of the contested claims have been modified by the Water Court as to amount, with the modifications predominantly constituting decreases in claimed amounts.

9. Approximately 35% of claimants do not expect that their water rights ever will be administered.

10. A substantial majority of respondents, approximately 85%, report having been treated fairly by the claims adjudication process.

## Water Rights Claimants Survey

1. Please describe your pre-July 1, 1973 water right(s) as decreed by the Water Court.

A. Types of use:

295 irrigation  
283 stock  
255 domestic  
17 commercial  
64 fire protection  
40 fish and wildlife  
7 industrial  
6 municipal  
14 multiple domestic  
13 mining  
7 power generation  
23 recreation

B. Basin of your water source:

94 Water Division for Yellowstone River and Little Missouri River  
46 Water Division for Missouri River below mouth of Marias River  
86 Water Division for Missouri River above mouth of Marias River  
122 Water Division for Clark Fork River and Kootenai River

C. Amount of water use:

166 less than 1 cubic foot per second (1 "cfs," which is equivalent to about 450 gallons per minute or 40 "inches" of water)

112 1 to 10 cfs (40 to 400 "inches")

42 more than 10 cfs (400 "inches")

17 more than 25 cfs (1,000 "inches")

18 more than 50 cfs (2,000 "inches")

2. Is your water rights claim

A. Based upon:

372 use which began before July 1, 1973?

35 use which began after July 1, 1973 or which has not yet begun?

B. Based upon:

148 your personal knowledge?

74 personal knowledge of another as communicated to you?

224 a "notice of appropriation" filed with a clerk and recorder's office?

3. Has your water rights claim

A. Been adjudicated in:

148 either a preliminary Water Court decree or a "temporary" decree?

86 a final Water Court decree?

32 none of the above?

124 don't know

B. Been investigated by DNRC (Montana Department of Natural Resources and Conservation)?

131 yes

75 no

175 don't know

C. Been objected to by other water users?

75 yes

243 no

64 don't know

4. Have you been involved in any hearings with the Water Court?

77 yes

310 no

If yes, answer the following questions:

A. Has your contact been:

34 by telephone?

15 by personal appearance?

27 both?

B. Has your contact been:

34 with the water master(s)?

19 with the water judge(s)?

20 both?

C. Have you retained an attorney to represent you before the Water Court?

38 yes

40 no

D. Have you retained a professional engineer to assist you in Water Court?

36 yes

67 no

E. Did you receive adequate notice of:

The scheduling of hearings?

66 yes

6 no

The subject matter of hearings?

59 yes

12 no

The results of hearings?

50 yes

21 no

F. Has your claim been modified by agreement?

36 yes

34 no

G. Has your claim been:

Modified by the Water Court as to amount?

30 yes (claim was 3 increased or 27 decreased  
by approximately     % of original claim)

41 no

Modified by the Water Court as to priority date?

8 yes (claim was 2 made more senior in priority  
or 6 made less senior in priority)

66 no

Modified by the Water Court as to place of use?

13 yes (acreage of claimed place of use was 2  
increased or 11 decreased)

55 no

Modified by the Water Court as to type of use?

8 yes

63 no

5. Are you aware of the amounts of use, priority dates and types of use of the water rights claimed by others out of the stream source of your claimed rights?

85 yes, very aware

113 yes, somewhat aware

169 no, not aware

6. Do you expect that the water rights decreed out of the stream source of your claimed rights will be controlled or regulated by a water commissioner?

108 in the near future (within 0-10 years)?

100 in the distant future (beyond 10 or more years)?

136 never?

7. If you foresee such control or regulation, whom would you expect to benefit by it?

137 private water users

72 federal government

19 Indian tribes

45 municipalities

37 industry

164 water rights located downstream from your rights not more than

86 5 miles away

37 50 miles away

18 150 miles away

50 farther away

8. Based upon your personal experience with the claims process, do you feel that you received fair treatment concerning adjudication of your pre-July 1, 1973 water right?

143 yes, very fair

114 yes, somewhat fair

45 no

APPENDIX III

RESULTS OF WATER RIGHTS ATTORNEYS SURVEY



## APPENDIX III

### RESULTS OF WATER RIGHTS ATTORNEYS SURVEY

Also as a result of our initial discussions with the Committee and our initial interviews, we decided to submit a survey to the attorneys identified by the Water Courts, the Committee's staff, and the DNRC as being active in the practice of water law in the adjudication. That list extended to 34 individual practitioners, and 23 of those attorneys returned completed surveys.

Following is a reprint of the Water Rights Attorney Survey form with responses tabulated. Our major conclusions from this survey are the following:

1. The water attorneys note significant variances among the various Water Courts in claims evaluation procedures, notice procedures, application of the prima facie evidence statute, and reliance on water masters.

2. A significant number of the water attorneys have noted significant variances among the Water Courts in their rulings on substantive legal issues.

3. Approximately 74% of the responding attorneys report that the current adjudication process does not provide them or their clients sufficient notice of the claims of other water users so that investigations can be completed in time to file appropriate objections.

4. Approximately 77% of the responding attorneys report that DNRC examination of claims materially increases the accuracy of the adjudication process, and 50% of the responding

attorneys report that such DNRC examination always or often results in material modifications of claims in issued decrees.

5. Approximately 77% of the attorneys report that DNRC examination should be utilized much more often by the Water Courts.

6. Only 35% of the responding attorneys report that the decrees issued by the Water Courts constitute accurate adjudications of water rights with greater than 50% certainty.

Water Rights Attorneys Survey

1. Do you represent clients involved in the Water Court adjudication process for pre-July 1, 1973 water rights?

23 Yes

0 No

If your response is yes, please answer the following questions.

- A. Are your clients active in the adjudication process as:

23 claimants? (specify approximate number of claims: \_\_\_\_\_)

22 objectors? (specify approximate number of objections: \_\_\_\_\_)

- B. Are your clients' claims related to the following uses?

18 irrigation

17 stock water

12 domestic

6 industrial

4 municipal

9 recreational

7 other (specify): \_\_\_\_\_

4 not applicable--clients are all objectors

- C. Are your clients' claims and/or the claims which caused objections by your clients the subject of

21 temporary preliminary decree(s)?

10 preliminary decree(s)?

4 final decree(s)?

2. In your representation of water rights claimants or objectors in Water Court adjudications, have you been involved in hearings before the Water Court, by actual court appearance or telephone conference?

20 Yes

3 No

If your response is yes, please answer the following questions.

- A. Have your Water Court hearings involved

20 procedural matters?

20 substantive issues?

19 both? (please specify approximate percentages for procedural: \_\_\_\_% and substantive: \_\_\_\_%)

- B. Have your hearings been conducted by:

19 water master(s)?

14 water judges(s)?

12 both (please specify approximate percentages for masters: \_\_\_\_% and judges: \_\_\_\_%)

- C. Have you always received adequate notice of the timing and purpose of your hearings?

13 Yes

8 No (please specify approximate percentage of notices which were inadequate: \_\_\_\_%)

- D. If you answered no to question 2.C, what has been inadequate about notices?

6 insufficient time to prepare for hearings

7 insufficient notice of the substance of hearings

- E. Of the claims in which you have participated in Water Court hearings on substantive issues, has your client or the opposing client utilized the services of a professional engineering consultant?

10 Yes (please specify approximate percentage of claims in which such consultants have been utilized: \_\_\_\_%)

10 No

3. Have you noticed significant variances among the practices of the various Water Courts in relation to the following:

A. Procedures for processing claims?

10 Yes

9 No

B. Notice procedures?

9 Yes

10 No

C. Application of the "prima facie evidence" statute?

11 Yes

7 No

D. Reliance on Water Masters?

8 Yes

9 No

4. Have you noticed significant variances among the Water Courts in their rulings on substantive legal issues?

8 Yes

12 No

5. Does the current process provide you or your clients sufficient notice of the claims of other water users so that necessary investigations can be completed and appropriate objections filed in a timely manner?

6 Yes

17 No

6. In your experience, does the DNRC investigation, or "verification," of water rights claims:

A. Materially increase the accuracy of the determination of the amount, priority and character of water right claims?

17 Yes

5 No

B. Result in material modifications of claims in the issuance of decrees?

  2   Always

  9   Often (more than 50%)

  9   Sometimes (less than 50%)

  1   Never

7. Should DNRC investigations of claims be utilized by the Water Courts:

 17  Much more often

  3  More often

  0  At the current level

  2  Less often

  0  Much less often

8. Under average conditions what is the ideal duty of irrigation water?

  0  30%

  5  50%

  0  70%

9. In your experience, to what extent do the decrees which have been entered by the Water Courts constitute accurate adjudications of pre-July 1, 1973 water rights?

  2  To a great extent (with more than 90% certainty)

  1  To a moderate extent (with more than 75% certainty)

  5  To an average extent (with more than 50% certainty)

 13  To a poor extent (with less than 50% certainty)

  2  Don't know

APPENDIX IV

PROPOSED LEGISLATION

## APPENDIX IV

### PROPOSED LEGISLATION

Following are proposals for changes to Montana's statutory law designed to implement the recommendations of our Final Report. Proposed deletions of statutory language are shown by slashes (/) and proposed additions of language are reflected in capital letters.

### INDEX

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1. LEGISLATION CONCERNING EFFECT OF TEMPORARY PRELIMINARY DECREEES AND NOTICE OF TEMPORARY PRELIMINARY DECREEES.

85-2-231. Preliminary decree AND TEMPORARY PRELIMINARY DECREE. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

(a) the statements of claim before the water judge;

(b) the data submitted by the department;

(c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(d) any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree AS PROVIDED IN SUBSECTION (5) BELOW, pursuant to 85-2-321 or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required

for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

(5) IN THOSE BASINS IN WHICH ADJUDICATION OF CLAIMS FOR FEDERAL OR INDIAN WATER RIGHTS IS PRECLUDED BY THE SUSPENSION OF ADJUDICATION PROVIDED BY 85-2-217, THE WATER JUDGE MAY ISSUE TEMPORARY PRELIMINARY DECREES IN ACCORDANCE WITH THE PROVISIONS AND REQUIREMENTS OF THIS SECTION. SUCH DECREES SHALL ADDRESS ALL CLAIMS IN SUCH BASINS EXCEPT FOR THOSE AFFECTED BY THE SUSPENSION REQUIRED BY 85-2-217.

(6) THE WATER JUDGE SHALL USE ANY TEMPORARY PRELIMINARY DECREE ISSUED UNDER SUBSECTION (5) IN ISSUING THE SUBSEQUENT PRELIMINARY DECREE, WHICH, WHEN ISSUED, SHALL SUPERCEDE AND REPLACE THE TEMPORARY PRELIMINARY DECREE.

85-2-232. Availability of preliminary decree AND TEMPORARY PRELIMINARY DECREE. (1) The water judge shall send a copy of the preliminary decree ISSUED FOR EACH SUBBASIN OR OF THE TEMPORARY PRELIMINARY DECREE ISSUED FOR EACH SUBBASIN to the department, and the water judge shall serve by mail a notice of availability of ~~the~~ SUCH preliminary decree OR TEMPORARY PRELIMINARY DECREE to each person who has filed a claim of existing right WITHIN THAT SUBBASIN AND ALL OTHER SUBBASINS WITHIN THE

SAME HYDROLOGICALLY INTERRELATED PORTION OF A WATER DIVISION and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which ~~A~~ claims of existing rights ~~HAS~~ HAVE been filed IN THOSE SUBBASINS or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice TO EACH PERSON WHO HAS FILED A CLAIM OF EXISTING RIGHT IN THE SUBBASIN FOR WHICH SUCH PRELIMINARY OR TEMPORARY PRELIMINARY DECREE SHALL HAVE BEEN ISSUED an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 85, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of ~~THE~~ SUCH preliminary decree OR TEMPORARY PRELIMINARY DECREE. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(2) Any person may obtain a copy of ~~THE~~ SUCH preliminary decree OR SUCH TEMPORARY PRELIMINARY DECREE upon payment of a fee of \$20 or the cost of printing, whichever is greater, to the water judge.

85-2-233. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person ENTITLED TO RECEIVE NOTICE THERETO UNDER 85-2-232, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 180 days after notice of the entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 180 days if application for the extension is made within 90 180 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Failure to object under subsection (1) to the compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's deter-

mination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection.

(7) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO TEMPORARY PRELIMINARY DECREES ENTERED PURSUANT TO 85-2-231.

3-7-211. Appointment of water commissioners. The ~~water/judge/of/each/water/division~~ DISTRICT COURT HAVING TERRITORIAL JURISDICTION OVER THE SUBBASIN IN WHICH THE CONTROVERSY ARISES may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.

3-7-213.// /des'ignat'voh/ o'f/ al'ter'nate/ ju'dge.// /the/ wa'ter  
ju'dge/ wa'y/ /des'ignat'e/ a/ his'tor'ic/ ju'dge/ /re'late'd/ d'is'tri'b't/ ju'dge/  
o'r/ a'n'o'ther/ wa'ter/ /ju'dge/ t'o/ p're's'i'de/ a'n/ h'is/ a'b'sen'ce/ o'n/ h'is  
be'half/ /a's/ wa'ter/ ju'dge/ f'o'r/ t'he/ i'm'me'd'iate/ en'f'o'r'cem'ent/ o'f/ a'n  
ex'ist'ing/ de'cre'e/ o'r/ t'he/ i'm'me'd'iate/ g't'a'n't'ing/ o'f/ ex'p'r'a'o'r'd'i'n'a'r'y  
re'l'ief/ a's/ na'g/ t'o/ p'r'o'v'id'e'd/ f'o'r/ b'y/ l'aw/ u'pon/ a'n/ al'l'e'gat'voh/ o'r  
i'r're'pa'r'able/ ha'r'm/.

121 // When / a / water / distribution / controversy / arises / upon / a  
 source / of / water / in / which / existing / rights / have / not / been  
 determined / according / to / part / 2 / of / this / chapter / any / party / to /



85-5-101. Appointment of water commissioners. \* \* \*

(2) When the existing rights of all appropriators from a source or in an area have been determined in a PRELIMINARY DECREE, TEMPORARY PRELIMINARY DECREE OR A final decree issued under chapter 2 of this title, the judge of the district court shall upon application by the department of natural resources and conservation appoint a water commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled.

\* \* \*



### 3. LEGISLATION CONCERNING CHANGES OF WATER RIGHTS.

85-2-402. Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right, NOR MAKE OR CAUSE ANY PHYSICAL RELOCATION, ENLARGEMENT, EXTENSION, REPLACEMENT, OR OTHER MODIFICATION OF EXISTING DIVERSION, CARRIAGE, DISTRIBUTION, OR STORAGE FACILITIES USED IN THE EXERCISE OF SUCH APPROPRIATION RIGHT except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right OR IN THE FACILITIES USED FOR ITS EXERCISE if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use OR FACILITIES CHANGE will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) THE PROPOSED CHANGE IN THE APPROPRIATION RIGHT OR IN THE FACILITIES USED IN ITS EXERCISE WILL NOT RESULT IN OR FACILITATE EITHER WASTE OF WATER OR A STREAM DEPLETION IN EXCESS OF THE STREAM DEPLETION CAUSED BY THE HISTORICAL BENEFICIAL USE OF WATER MADE IN THE EXERCISE OF THE APPROPRIATION RIGHT.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-

feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by substantial credible evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

\* \* \*

(11) A change in appropriation right OR THE FACILITIES USED IN ITS EXERCISE contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right OR FACILITIES. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right OR FACILITIES USED IN ITS EXERCISE except in accordance with this section.

4. LEGISLATION CONCERNING CORRECTION OF CLERICAL ERRORS IN DECREEES.

85-2-234. Final decree.

\* \* \*

(7) CLERICAL MISTAKES IN ANY FINAL DECREE MAY BE CORRECTED AT ANY TIME BY THE WATER JUDGE ON HIS OWN INITIATIVE OR ON THE PETITION OF ANY PERSON. THE WATER JUDGE SHALL ORDER SUCH NOTICE OF ANY CORRECTION PROCEEDINGS AS HE DETERMINES TO BE APPROPRIATE TO ADVISE ALL PERSONS WHO MAY BE AFFECTED THEREBY. ANY ORDER OF THE WATER JUDGE MAKING OR DENYING SUCH CORRECTION SHALL BE SUBJECT TO APPELLATE REVIEW.

5. LEGISLATION CONCERNING THE PRIMA FACIE EVIDENCE STATUTE.

85-2-227. Claim to constitute prima facie evidence. FOR PURPOSES OF ADJUDICATING RIGHTS PURSUANT TO THIS CHAPTER, a claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content until issuance of a final decree. FOR PURPOSES OF ADMINISTRATION OF WATER RIGHTS, THE PROVISIONS OF ANY TEMPORARY PRELIMINARY DECREE OR PRELIMINARY DECREE SHALL SUPERCEDE SUCH CLAIM OF EXISTING RIGHT UNTIL A FINAL DECREE IS ISSUED.

6. LEGISLATION CONCERNING REOPENING AND REVIEW OF PREVIOUSLY ISSUED PRELIMINARY, TEMPORARY PRELIMINARY AND FINAL DECREES.

85-2-237. REOPENING AND REVIEW OF DECREES. (1) WITHIN 180 DAYS FOLLOWING THE EFFECTIVE DATE OF THIS SECTION, THE WATER JUDGES SHALL PROVIDE BY ORDER FOR THE REOPENING AND REVIEW, WITHIN THE LIMITATIONS OF THE PROCEDURES HEREINAFTER SET FORTH, OF ALL PRELIMINARY, TEMPORARY PRELIMINARY OR FINAL DECREES WHICH SHALL HAVE BEEN ISSUED BY THEM PRIOR TO THE EFFECTIVE DATE OF THIS SECTION.

(2) SUCH ORDER SHALL PROVIDE THAT THE WATER JUDGE WILL REOPEN AND, UPON A HEARING, REVIEW ITS DETERMINATION OF ANY CLAIM IN SUCH DECREE UPON A TIMELY FILING OF AN OBJECTION TO SUCH CLAIM WHICH SHALL HAVE BEEN MADE WITH THE SAME SPECIFICITY AS IS REQUIRED FOR THE FILING OF OBJECTIONS UNDER 85-2-233(3).

(3) THE WATER JUDGES SHALL SERVE NOTICE OF THE ENTRY OF THE ORDER PROVIDING FOR REOPENING AND REVIEW TO THE DEPARTMENT AND TO THE SAME CLASS OF PERSONS AS WOULD BE ENTITLED TO RECEIVE SERVICE OF NOTICE UNDER THE PROVISIONS OF 85-2-233, AS AMENDED.

(4) NO OBJECTION SHALL BE EFFECTIVE TO CAUSE A REOPENING AND REVIEW OF ANY PARTICULAR CLAIM UNLESS THAT OBJECTION SHALL HAVE BEEN FILED WITH THE APPROPRIATE WATER COURT NOT LATER THAN 180 DAYS AFTER THE ISSUANCE OF THE ORDER PROVIDED FOR IN 85-2-237(1) WHICH PERIOD OF TIME MAY, FOR GOOD CAUSE SHOWN, BE EXTENDED BY THE WATER JUDGE FOR AN ADDITIONAL 180 DAYS, IF APPLICATION FOR SUCH EXTENSION IS MADE WITHIN 180 DAYS AFTER THE ENTRY OF THAT ORDER.

(5) THE WATER JUDGE SHALL NOTIFY THE CLAIMANT OF THE TIMELY FILING OF AN OBJECTION TO HIS CLAIM, AND AFTER FURTHER REASONABLE NOTICE TO BOTH THE CLAIMANT AND THE OBJECTOR, SET THE MATTER FOR HEARING. THE WATER JUDGE MAY CONDUCT INDIVIDUAL OR

CONSOLIDATED HEARINGS. A HEARING SHALL BE CONDUCTED AS FOR OTHER CIVIL ACTIONS. ON THE ORDER OF THE WATER JUDGE, A HEARING MAY BE CONDUCTED BY THE WATER MASTER, WHO SHALL PREPARE A REPORT OF THE HEARING AS PROVIDED IN M.R.CIV.P., RULE 2(E).

(6) THE WATER JUDGE SHALL, ON THE BASIS OF ANY HEARING HELD ON THE MATTER, TAKE SUCH ACTION AS MAY BE WARRANTED FROM THE EVIDENCE THEN BEFORE HIM, INCLUDING DISMISSAL OF THE OBJECTION OR MODIFICATION OF THE PORTION OF THE DECREE EVIDENCING THE CONTESTED CLAIM.

(7) ORDERS OR DECREES MODIFYING PREVIOUSLY ISSUED FINAL DECREES AS A RESULT OF THE PROCEDURES PRESCRIBED HEREIN SHALL BE APPEALABLE IN THE MANNER PROVIDED BY LAW FOR APPEALS TAKEN FROM FINAL ORDERS OF DISTRICT COURTS.

(8) APPEALS FROM ORDERS OR DECREES MODIFYING PREVIOUSLY ISSUED PRELIMINARY OR TEMPORARY PRELIMINARY DECREES AS A RESULT OF THE PROCEDURES SET FORTH HEREIN MAY BE TAKEN UNDER 85-2-235 WHEN SUCH PRELIMINARY OR TEMPORARY PRELIMINARY DECREES HAVE BEEN MADE FINAL DECREES.

APPENDIX V

COMMENTS ON DRAFT REPORT

DATED JULY 29, 1988

TITLED

"EVALUATION OF MONTANA'S WATER RIGHTS ADJUDICATION PROCESS"





# WATER POLICY COMMITTEE

## Montana State Legislature

### SENATE MEMBERS

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Esther G. Bengtson  
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Dennis Iverson  
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Glen Spierth

### COMMITTEE STAFF

Environmental Quality Council  
Capitol Station  
Helena, Montana 59620  
(406) 444-3742

August 18, 1988

Jack F. Ross  
Saunders, Snyder, Ross & Dickson, P.C.  
707 Seventeenth Street  
Suite 3500  
Denver, CO 80302

Dear Jack:

Thank you for submitting the draft report, which we received on August 1. As staff for the committee we will not comment substantively on the findings and conclusions and will focus instead on offering comments based on the requirements of the approved study design. In general, though, we commend you for providing a very readable and concise report.

#### A. DNRC Roles, Practices, and Relationship with the Water Court

1. Separation of powers. A major concern has been the flip side of the separation of powers issue addressed. That is, does the Water Court in providing direction to the Department of Natural Resources and Conservation (DNRC) unlawfully interfere with the powers delegated to this executive agency? Of particular controversy has been the Court's involvement in regulating field investigations.

2. DNRC's Multiple Roles. The DNRC's functions are not separated by division. The functions appear to be divided according to the following format: Engineering Bureau, Water Resources Division (WRD) -- claimant; New Appropriations Program, Water Rights Bureau, WRD -- permitting entity; Adjudication Program, Water Rights Bureau, WRD -- examiner; Legal Staff, Director's Office -- objector.

3. Adequacy of Claims Examination. The question stated in the study design is addressed.

4. Efficiency of Examination Process. The question stated in the study design is addressed.

5. Sufficiency of Claimants' Access to DNRC Information. The question stated in the study design is addressed.

6. Claimants' Perception of Fairness of DNRC Process. The question stated in the study design is addressed.

**B. Water Court Practices and Procedures.**

1. Extent of Variance in Procedures and Guidelines Applied to Claims. The question stated in the study design is addressed.

2. Adequacy of Notice of Adjudication Proceedings. The narrative does not appear to address in much detail the factual question: "[t]o what extent have varying procedures and guidelines been applied to different water rights claims?"

3. Late claims and objections. The narrative does not address whether, or how, late objections (assuming they occur) are handled.

4. Sufficiency of Water Court Adjudication Schedule to Insure Due Process. The narrative does not state clearly whether or not the timeline proposed by the Water Court is sufficient to ensure adequate due process for all claimants including the resolution of federal and tribal claims in the State Courts (although it suggests an additional notice and objection period for preliminary and final decrees is "necessary and desirable").

5. Optimum adjudication schedule. The question in the study design is addressed.

6. Sufficiency of Claimants' Access to Court Information. The question stated in the study design is addressed.

7. Efficiency of Water Court. The question stated in the study design is addressed.

8. Constitutionality of Water Court Structure. The question stated in the study designed is addressed.

9. Sufficiency of Water Court's Claims Index and Docket System. The question stated in the study design is addressed.

10. Water Court's Criteria for Requiring Further Proof. The question stated in the study design is answered, though the

"gray area" remarks are described differently in the new claim examination rules.

C. McCarran Amendment Considerations

1. McCarran Amendment Adjudication Issues. The narrative describes a congressional and judicial history, with some explanation of rationale, but does not state explicitly the necessary elements for a McCarran amendment adjudication.

2. Sufficiency of Montana Act Under McCarran Standards. The question stated in the study design is addressed.

3. Adequacy of Integration of Federal Rights. The question stated in the study design is addressed implicitly.

4. Conflicts Between Montana Law and Federal Law. The question stated in the study design is addressed implicitly.

5. Montana Adjudication Remedial Measures. The question stated in the study design is addressed.

D. Accuracy of Adjudication Decrees.

1. Accuracy of Final Decrees. The question stated in the analysis part of the study design is addressed. Was a random sample of claims for accuracy undertaken, as suggested in the data collection part of the study design?

2. Desirability of a Mandatory Adversarial System. The question stated in the study design is addressed.

3. Usefulness of Decrees to Water Users. The question stated in the study design is addressed.

4. Reliability of Decrees in Equitable Apportionment or Interstate Compacting. The question stated in the study design is addressed.

5. Statutory Process to Correct Adjudication Errors. If errors of substance are found in a final decree, is there a process that could be established statutorily to address these errors (or are 85-2-235 and 85-2-402, MCA adequate)?

6. Effect of Final Powder River Decree on Unadjudicated and Noncompacted Federal Rights. The question stated in the study design is addressed.

E. Additional Questions Concerning the Adjudication Process

1. Legality of the Conclusive Presumption of Abandonment. The question stated in the study design is addressed.

2. Effect of the Prima Facie Evidence Statute and Need for Any Modification. The question stated in the study design is addressed.

3. Need for Additional Delineation of DNRC Responsibilities. The question stated in the study design is addressed.

4. Legal Effect of Decrees Issued by the Water Courts. Is administration of nonfinal decrees by water commissioners a legitimate policy option? If a need for comprehensive water right administration developed, what legislation would be necessary?

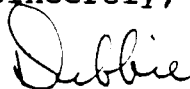
5. Effects of the 1986 Stipulation and Related Court Decisions and Rulemaking. The narrative does not address legislation unrelated to the 1986 stipulation, including HB 754, the bill sponsored by the Water Policy Committee last session (the study design includes consideration of recent legislation).

6. Integration of Subbasins by Notice of Mainstem Claims. The question stated in the study design is addressed.

In general, the Committee might benefit from additional explanation and documentation, particularly where the answers to the study questions are summarized briefly.

We hope these comments are helpful and particularly wish to thank you for submitting the report in a timely manner. Please call us if you have any questions.

Sincerely,



Deborah B. Schmidt



Robert J. Thompson



**MONTANA WATER COURTS**  
**STATE OF MONTANA**

August 9, 1988

**WATER JUDGES:**

Upper Missouri River Basin  
Chief Judge W. W. Lessley  
P.O. Box 879  
Bozeman, MT 59771-0879

Lower Missouri River Basin  
Judge Bernard W. Thomas  
P.O. Box 938  
Chinook, MT 59523

Clark Fork River Basin  
Judge Leif Erickson  
P.O. Box 839  
Kalispell, MT 59903-0839

Yellowstone River Basin  
Judge Roy C. Rodeghiero  
P.O. Box 448  
Roundup, MT 59072

Water Policy Committee  
c/o Environmental Quality Council  
Capitol Station  
Helena, MT 59620

Re: Comments to Draft Report on  
Water Adjudication Process

Dear Senator Galt:

Enclosed please find comments made by the Montana Water Court to the Draft Report prepared by Saunders, Snyder, Ross and Dickson, PC.

The Draft Report does a good job of addressing many of the legal questions concerning Montana's water adjudication. Our comments will be brief.

Under the discussion of separation of powers, pages 12 and 13, Draft Report, there is no clear statement regarding one of the most controversial separation of powers issues - that is whether the Water Court's past and present directions to DNRC pursuant to Sec. 85-2-243, MCA, as applied, constitute an unconstitutional exercise of executive or administrative authority by the Water Court. A statement on this issue by the consultant could help resolve current controversy.

Thank you for the opportunity to comment on the Draft Report.

Best personal wishes

*W. W. Lessley*  
W. W. Lessley  
Chief Water Judge

WWL:lmb

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AUG 10 1988  
ENVIRONMENTAL  
QUALITY COUNCIL

**Montana Department  
of  
Fish, Wildlife & Parks**

August 17, 1988



**RECEIVED**  
AUG 17 1988  
ENVIRONMENTAL  
QUALITY COUNCIL

Deborah Schmidt  
Executive Director  
Environmental Quality Council  
Room 432  
State Capitol  
Helena, MT 59620

Re: Draft Evaluation of Montana's  
Water Rights Adjudication Process

Dear Deborah:

The Department of Fish, Wildlife and Parks is reviewing the Draft Evaluation of Montana's Water Rights Adjudication Process prepared for the Water Policy Committee. The report indicates that Wright Water Engineers, an engineering firm, was hired to do an independent evaluation of the accuracy of Water Court decrees. It is my understanding that the Wright Water Engineers report and other investigations conducted by the law firm of Saunders, Snyder, Ross and Dixon have not been submitted to the Water Policy Committee staff for review. I respectfully request an opportunity to review the reports relied upon in preparing the Draft Evaluation. All such reports are public documents and must be made available for public review under Article II, Section 9 of the Montana Constitution and Montana's Public Records Acts. Please consider this a formal request for copies of the documents in question. If there is a charge for making copies of these documents, please advise.

Thank you for your cooperation.

Sincerely,

*Robert N. Lane*

Robert N. Lane  
Chief Legal Counsel

*Steve Brown*

G. Steven Brown

**Montana Department  
of  
Fish, Wildlife & Parks**



August 17, 1988

**RECEIVED**

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**ENVIRONMENTAL  
QUALITY COUNCIL**

Deborah Schmidt  
Executive Director  
Environmental Quality Council  
Room 432  
State Capitol  
Helena, MT 59620

Re: Draft Evaluation of Montana's  
Water Rights Adjudication Process

Dear Deborah:

The Department of Fish, Wildlife and Parks ("DFWP") submits the following comments to the July 29, 1988 Draft Evaluation of Montana's Water Rights Adjudication Process:

1. Separation of Powers and DNRC's Multiple Roles (pages 12 through 16 of the Draft Evaluation of Montana's Water Right Adjudication Process, hereinafter "Draft Evaluation"). The discussion of separation of powers and DNRC's multiple roles may be legally correct. However, the analysis completely misses the legal issues raised by the Department and Board of Natural Resources and Conservation ("DNRC" or "BNRC"). At issue is whether the Water Court can control the exercise of discretion by DNRC in the verification of claims. There is no discussion of this issue in the Draft Evaluation.

The Montana Supreme Court concluded in Matter of the Activities of the Department of Natural Resources and Conservation, Mont. \_\_\_\_, 740 P.2d 1096, 44 St. Rptr. 604 (1987) that it did not have a sufficient factual record to rule on the separation of powers issues raised by DNRC and BNRC (Id., at p. 616). The Supreme Court then cited the Stipulation as support for a finding that the Water Court has no "intention . . . to override or control the day to day operations of the DNRC" (Id.).

The Montana Supreme Court has not ruled on the question of whether the Water Court is violating the separation of powers doctrine by preventing DNRC from properly investigating all claims filed under the Senate Bill 76 adjudication. There is a

Deborah Schmidt  
August 17, 1988  
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great difference between the Water Court's authority to control what is admissible as evidence in a judicial proceeding and the Water Court's authority to control the executive branch's daily activities. All that DNRC and BNRC asserted in its dispute with the Water Court was that DNRC had discretion to conduct its own evaluation of claims and prepare that documentation for consideration by any person who might wish to review it. The Water Court, of course, is free to rule on the admissibility of DNRC's investigative information or determine what weight the information will be given in Water Court proceedings. The authors of the Draft Evaluation did not address the central legal question raised in Matter of the Activities of the Department of Natural Resources and Conservation.

The Water Court continues to interfere with the daily activities of DNRC in compiling information about pre-July 1, 1973 water right claims. The orders issued by the Water Court prohibiting DNRC from re-examining claims under the Supreme Court's new verification procedures are examples of the Water Court's intention to control DNRC's investigative functions. DFWP also submitted substantial evidence documenting the Water Court's interference with DNRC's attempts to reverify claims in Matter of the Adjudication of the Existing Rights to the Use of all the Water, Both Surface and Underground, Within all Water Basins Within the State of Montana, Water Court Cause No. 88-1. DFWP will be glad to discuss this information with the Water Policy Committee on August 29, 1988 if you so desire.

2. Adequacy of Claims Examination. The authors of the Draft Evaluation conclude on page 17 that the verification of claims before the adoption of rules by the Supreme Court was adequate when coupled with the judicial process established by the Water Court and the ability to object to claims. There is no substantiation for this conclusion.

The Draft Evaluation (p. 30) points out that 130,000 claims are in the process of being included in temporary preliminary or preliminary decrees. Over 109,000 of a total of approximately 204,000 claims had already been verified as of March 1988. It has been DFWP's contention that the old verification procedures were inadequate. These claims will not be reverified under the Supreme Court's new verification rules as far as the Water Court is concerned and nothing in the Water Court's adjudication procedure is designed to identify problem claims in the absence of an objection.



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The authors of the Draft Evaluation state on page 3 that the subcontractor, Wright Water Engineers, provided "an independent objective evaluation of the accuracy of Water Court decrees and the Water Court/DNRC claims evaluation process." The Wright Water Engineers' report and other accuracy reports were not included in the Draft Evaluation. Before DFWP can comment on the Draft Evaluation's accuracy conclusions, the supporting documentation for those conclusions must be available for public review. By separate letter, DFWP has requested a copy of the Wright Water Engineers' report and all similar investigation reports. Accuracy of the Water Court's decrees may be the most important issue to be addressed. A conclusion that the decrees are accurate without supporting documentation will not resolve the issue. The Water Policy Committee and the public need to know how many claims were examined and what process was used to evaluate the accuracy of claims.

3. Variance in Verification Procedures. The authors of the Draft Evaluation conclude that the variance in verification procedures is not significant and that Water Court procedures will resolve any problems (pp. 21 and 22 of Draft Evaluation). In support of this contention, the authors claim that the Water Court has ordered DNRC to re-examine 4 partially verified basins under the new rules. DFWP believes this assertion is incorrect.

Perhaps the only point that needs to be made here is that over 109,000 claims have been verified under 35 "updated" and now outdated verification procedures. The remaining 95,000 will be verified under a new set of verification procedures issued by the Supreme Court. Of course, we don't even know if these verification procedures are final since the Supreme Court has never issued a final order adopting the new verification rules. There are significant differences between the new and old verification procedures. The Draft Evaluation concludes that Water Court procedures and appeals will eliminate any inequities in the treatment of claims without detailing which procedures will overcome the deficiencies in the old verification process.

4. Inadequate Notice. We concur in the recommendation that all decrees previously issued by the Water Court must be subject to a new and expanded notice procedure. It should be emphasized that this is especially true where Indian and federal claims being negotiated by the Compact Commission are involved.

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5. Water Court Efficiency. The Draft Evaluation concludes that the Water Court has been "highly efficient" in the adjudication of claims. No one has ever disputed that the Water Court has been efficient. The assertion has always been that the Water Court's efficiency has been at the expense of accuracy. If the information which forms the basis of the Court's adjudication is inaccurate, then no degree of efficiency can prevent grossly inadequate final decrees. This "garbage in, garbage out" problem is not addressed in the Draft Evaluation.

6. Constitutionality of the Water Court Structure. The authors of the Draft Evaluation go to great lengths to respond to Donald MacIntyre's law review article questioning the constitutionality of the Water Court. DFWP believes the analysis ignores the Constitutional Convention's unwaivering commitment to electing judges in Montana. The following excerpts from the Constitutional Convention debates emphasize this point.

Delegate Dave Holland presented the Judiciary Committee's majority proposal for election of judges. Delegate Holland stated:

"I submit to you that the people of this state want to elect their judges and, if we come out of here with an appointive system, that this thing alone, in my estimation, could bring down the whole constitution." [Montana Constitutional Convention Verbatim Transcript, Vol. IV, p. 1013, hereinafter "Convention Tr."]

Even the Judiciary Committee's minority proposal, which involved the initial appointment and subsequent election of judges, clearly recognized that Montanans want to elect their judges. Delegate Berg presented the minority proposal and recognized that:

". . . we, at least in the minority, did not feel that we should ever divorce the Judiciary from the electorate. We feel some kind of elective process is essential in the selection of the judiciary, as well as the selection of other officers." [Convention Tr. 1023.]

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If there is any doubt that the Constitutional Convention believed that judges should be elected, the language in Article VII, Section 8(2) ends that doubt. An incumbent district or supreme court judge who is unopposed must have his or her name placed on the general election ballot for the purpose of allowing voters to approve or reject the judge. District and supreme court judges are the only elected officials under Montana law subjected to a rejection vote when they are unopposed.

The Constitutional Convention's commitment to electing judges also negates any assertion that appointment of water judges for set terms and service for nine years can be considered a "temporary" appointment under Article VII, Section 6(3). DFWP suggests that the authors of the Draft Evaluation research and consider the Constitutional Convention transcripts in the evaluation of this issue.

7. Accuracy of Final Decrees. Pages 6 and 46 conclude that it is not necessary to have final decrees that are 100% accurate. DFWP has never asserted that the final decrees must be 100% accurate. The Draft Evaluation misses the central issue and addresses an issue that no one has raised.

8. Powder River Decree is Not Final. We commend the authors of the Draft Evaluation for this finding.

9. The Conclusive Presumption of Abandonment Language is Legal. This is an excellent analysis and cites the case relied on by DFWP in its Supreme Court arguments. The recommendation that forfeited late claims be given a priority date junior and inferior to all other pre-July 1, 1973 rights must be carefully examined by the Water Policy Committee.

10. General Observation -- Accuracy. The poll of water rights attorneys confirms that only 35% of the 23 lawyers responding believe that Water Court decrees are accurate with greater than 50% certainty. Thirteen of the 23 lawyers believe that the decrees are grossly inaccurate (less than 50% certainty). Only three believe the Water Court's decrees are accurate with more than 75% certainty. The lawyers involved in the adjudication process fully understand the inadequacy of the Water Court's procedures. It is important that all documentation concerning the Draft Evaluation's accuracy conclusions be available for public review.

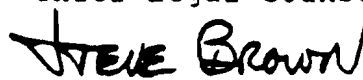
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We look forward to discussing these matters with you and the Water Policy Committee on August 29, 1988.

Sincerely,

Handwritten signature of Robert N. Lane in black ink.

Robert N. Lane  
Chief Legal Counsel

Handwritten signature of G. Steven Brown in black ink.

G. Steven Brown

COMMENTS BY DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION (DNRC) TO THE JULY 29, 1988,  
DRAFT "EVALUATION OF MONTANA'S WATER RIGHTS  
ADJUDICATION PROCESS"

August 17, 1988

## GENERAL COMMENTS

The draft report is written in clear and understandable language. However, it is not well-documented. As a prime example, no supporting documentation is included from the engineering firm which was hired as part of the study. Also, because the executive summary is not numbered to correspond with the appropriate analytical section, it is difficult to relate the summary conclusions to its corresponding rationale. The final report should be restructured to have the relevant executive summary conclusion as a final paragraph following the pertinent analysis.

The Consultant has presented the draft study in a style which does not openly criticize any party involved in Montana's adjudication. Although this approach may be politically appropriate, the draft report does express serious concerns with the implementation of the adjudication. These serious problems will be overlooked, at least by the casual reader, because of the benign presentation. This may make it more difficult to enact meaningful corrective legislation if most legislators are willing to accept the report because of its style as a recommendation to maintain the status quo.

Also, the draft report has failed to address the real issues which lead to the need for the study. The Consultant has addressed peripheral issues but has not followed up with the issues central to the controversy, many of which were required by the study plan. Consequently, the casual reader is left with the impression that the central issues have been addressed and that the status quo should be maintained.

In the draft report the Consultant justifies some of its findings by limiting the finding to the "current phase" (e.g., Summary No. 17, and pages 6 and 43). The Consultant needs to define the term because the adjudication is in differing phases throughout the state. Second, and more important, the report should be concerned with the entirety of the adjudication and not a specific phase. The fact that a particular phase of the process is adequate does not mean that the final product will be adequate. The purpose of commissioning the report is to acquire professional judgment to point out the potential pitfalls with the process as it is projected to proceed. For example, the Consultant pointed out the pitfalls with respect to basin notice and the Powder River Decree, but failed to follow through on other important issues such as adequacy and separation of powers.

The Consultant has concluded that the decrees are not 100% accurate. No assertion has ever been made that decrees are expected to be 100% accurate. The guidance the Consultant was expected to provide is a range of accuracy Montana should strive

to achieve a high level of confidence that the results of the adjudication can be successfully used for the purposes described on pages 9 and 10 of the report.

Attorneys generally understand due process, equal protection, separation of powers and the other constitutional and legal concerns inherent in a judicial process such as Montana's adjudication. The Consultant's "Water Rights Attorneys Survey" establishes that less than 10% of the attorneys surveyed believe the decrees constitute accurate adjudications to any great extent; less than 5% to a moderate extent; and nearly 80% have less than 75% certainty in the accuracy of the adjudication. Rather than criticize the state for its implementation of the process, the Consultant argues, by necessary implication, for a cataloging of existing water rights and then to have DNRC look at historical use in change proceedings. In other words, the real work to an adjudication is being shifted from the courts to an administrative agency in change proceedings. Although the suggested remedy will expedite the adjudication, it renders the adjudication little more than a claims registration program.

Essentially, the Consultant has selected a remedial measure (strengthen the administrative change process) to conclude that there is no real need to be concerned with the accuracy of the adjudication. However, the Consultant has no mechanism to control the discretion of the legislature in passing such remedial legislation and so Montana is left with the issue unanswered--is the adjudication being implemented to assure a high confidence of accuracy? The Consultant should discuss the problems with the adjudication that make adequacy a problem as is perceived by the vast majority of attorneys who responded to the questionnaire. For example, most attorneys recognize that the setting of priorities in the adjudication, as a matter of law, will make priority dates res judicata in a change proceeding. The adequacy of establishing priorities cannot be passed on to the DNRC in a subsequent administrative proceeding.

Throughout the draft report the Consultant has put the cart before the horse; because of a perceived remedy the Consultant has ignored the problem. An approach like the Consultant's handling of the question of the accuracy of the decree process is used at page 45 in the McCarran Amendment sufficiency analysis where it is stated "[a]s previously discussed, we do not find the water court's implementation of the statutes to provide an unreasonable means of determining water rights, particularly in light of the remedies available to address improper court conduct or inaccurate results." The Consultant appears content to accept any potential flaw in the implementation of the adjudication so long as there is a judicial remedy. However, the legislature has recognized that judicial remedies are available and that the state and federal agencies, as well as major water users, do and will continue to utilize the courts if the legislature is

unwilling to correct perceived wrongs. A major purpose for authorizing the study was to identify the problems, if any, that could be legislatively cured; it is unlikely the legislature intended to have the Consultant pass over potential problems because there is access to the courts or because potential remedial legislation can be enacted. Because of the Consultant's approach, identification and analysis of existing problems with the implementation of the adjudication is inherently weak.

Similarly, the study concluded at pages 7, and 20 through 22, that there is no legal problem inherent in the use by the Water Court of evolving or differing procedures and guidelines in the adjudication process. Again, the stated reason for the finding is that water users can avail themselves of their due process rights so long as one chooses to participate as an adversary in the adjudication. The Consultant found no issue requiring legislative attention because "[w]e assume that the Court will address any other problems or that appeals to the Supreme Court will do so." Frankly, the differing procedures issue is one of fairness. Claimants and objectors should not be callously required to advocate their due process rights in an appeal to the Montana Supreme Court. Although legislation need not be required to remedy the issue, sufficient documentation of the problem in the report as a fairness issue may motivate the Water Court to strive for uniformity from basin to basin, and within basins, without judicial prompting from the Montana Supreme Court.

#### SPECIFIC COMMENTS

1. COMMENT - page 4, Summary No. 1 on separation of powers.

Summary No. 1 of the draft evaluation executive summary states:

1. We conclude that the investigative functions performed by DNRC in aid of the adjudication process do not violate the separation of powers doctrines.

Page 12 of the draft evaluation states:

The specific question we were asked to address was whether the DNRC, a department of the executive branch, unlawfully exercises a judicial power when it develops factual information under section 85-2-243, MCA to be used by the Water Court in the adjudication of pre-1973 water rights.

The DNRC agrees with the answer to the question framed above. However, the question framed on page 6 of the December 11, 1987, "Detailed Study Design According to Task and Question" (Study Design) reads:



Is there a separation of powers problem in regard to the relationship between the Water Court and the DNRC? Are remedial measures needed?

The critical separation of powers issue here is not whether the DNRC can develop factual information for the Water Court's use--no one has questioned that-- the issue is whether the Water Court's control of the day-to-day activities of this executive agency violates the separation of powers. The Water Court is able to control the extent to which the DNRC gathers facts. These issues are set out in the DNRC briefs in the case of Activities of the Department of Natural Resources and Conservation, 740 P.2d 1096 (Mont. 1987), copies of which have been provided. Since that case decided that the Montana Supreme Court would adopt the examination rules as its own, the separation of powers issue remains and may even be exacerbated. The Confederated and Salish Kootenai Tribes have continually raised the separation of powers issue. Their latest arguments are found in their March 15, 1988, "Comments of the Confederated Salish and Kootenai Tribes of the Flathead Reservation on the Water Rights Claims Examination Rules of the Montana Supreme Court" filed in Case No. 86-397, a copy of which has been provided.

The issue is not whether the DNRC can gather facts for the Water Court--the issue is whether the Water Court can constitutionally control the DNRC to the extent that the Water Court must give permission to the DNRC to perform its administrative duty.

2. COMMENT - page 4, Summary No. 3 on claim examination procedures.

Summary No. 3 of the draft evaluation executive summary states:

We found the claims examination procedures used by DNRC both before and after the promulgation of the new rules by the Supreme Court to have been adequate to provide reasonable evidentiary material for the Water Courts' use. (emphasis added).

The DNRC does not believe the claims examination procedures adopted before the promulgation of the new rules by the Supreme Court were adequate to provide reasonable evidentiary material for the Water Courts' use. For example, out of almost 70,000 claims examined under the old procedures, the Water Court allowed less than 20 field investigations. Additionally, important resource materials such as the Water Resource Surveys could often not be used. Because of these and other inadequacies, the DNRC was a proponent of the new claims examination procedures.

Finally, a question not answered here is whether the new claims examination rules should even have been adopted by the Montana Supreme Court. Since the rules are procedural but also substantively affect water rights the way they are applied, the question arises as to the propriety of the Supreme Court to adopt rules it may later be asked to rule on. This due process concern is beyond, and in addition to, the separation of powers issue.

3. COMMENT - page 5, Summary No. 7 on evolving guidelines.

Summary No. 7 of the draft evaluation executive summary reads:

7. We found no legal problem inherent in the use by the Water Courts of evolving or differing procedures and guidelines in the adjudication process.

Page 17 of the draft evaluation also states:

The question is whether the verification of claims under the original process, (as evolved and amended until the promulgation of the new rules) was adequate to verify the existence and nature of water right claims. We believe that it was, when coupled with the judicial process established by the Water Court and the availability of objection to claims in the Water Court.

The DNRC believes that verification under the original process was not adequate to verify the existence and nature of water right claims. There are numerous factors which prompt this observation. Several of the more important factors are:

- Inconsistency due to changing procedures between basins and during a basin review
- Little or no review for "other uses" claims
- Limited claimant contact
- Few field investigations
- Limited types of issues that were allowed to be described

Claims under the old process were not reviewed under a consistent and uniform process. There were 35 updates to the old verification manual consisting of 336 separate changes between 1982 through 1985. Procedures which changed during the course of a basin verification were generally not retroactively

applied, resulting in unequal treatment in reviewing and objecting to the claims in a basin. For example, depending on when an irrigation claim was reviewed, acreage may have been reduced based on DNRC verification information. In other instances the claimed acreage was not reduced when the DNRC found less acreage unless someone objected or the Water Court heard the issue on its own motion. In short, claimants were not treated equitably in the verification process.

Under the former verification procedures, there was little or no review for "other uses" claims. These include claims to mining, commercial, industrial, municipal, fish and wildlife, wildlife, recreational, and hydropower uses. They were for the most part decreed as claimed. Since there was little or no review for reasonableness, issues such as excessive flow rate, excessive volumes, or prolonged periods of nonuse were rarely noted. Under the new examination procedures, more information will be collected through questionnaires, claimant contact, and field investigations so that claims for these uses can be compared to what is reasonable and customary for the specific purpose.

The past verification policy limited claimant contact to specific situations, and in some situations only with Water Court approval. Because of the limiting nature of the past policy, claimants were often not contacted when elements of a water right were unclear and questionable. It has been observed by the number of claimants objecting to their own claims that the lack of a more in-depth review, especially through claimant contact, has increased the inaccuracies and inconsistencies in the decrees. This is supported by the opinions expressed on page 16 of the draft report, with which states:

... with so many thousands of claims being filed by claimants not experienced in such matters, it would not be surprising that many may have been confused about what to file for and how to complete the claim forms. Given the nature of human beings, undoubtedly some claimants could be expected to exaggerate their claims intentionally, while other exaggerations may have occurred through inadvertence or misunderstanding. However, we have not been persuaded from the evaluation of the available evidence including Wright Water Engineers' investigation, that there has been a deliberate, wholesale and pervasive exaggeration of claims. Even if there were, the claims verification procedures authorized by the statute and now implemented under Supreme Court rules can provide a tool for the Water Courts to use in correcting any excesses found to exist while processing and evaluating the validity of claims now before them. (emphasis added).

The present examination procedures encourage claimant contact to clear up discrepancies which would likely have been decreed under the previous procedures due to the limited claimant contact at that time.

The fact that the DNRC was only allowed to field investigate less than 20 of the first 70,000 claims decreed (barely 0.03%) is evidence that the former policies were deficient. Failure to field investigate likely resulted in erroneous claims being decreed with incorrectly identified issues due to inadequate data. Examples might be claims to historically irrigated acreage or mining claims not identifiable on available data sources. The present option of conducting a field investigation, at a minimum, ensures correct identification of issues, allowing the judicial process of objections to function. In the past the use of this integral option was virtually prohibited.

In the past, the DNRC was restricted to providing the specific information requested by the water courts. Only certain issues were noted in the decrees. Examples of issues not identified are:

- Incremental development of irrigation rights
- Filed and use rights on formerly adjudicated streams
- Amendments expanding a claim
- Application of the irrigation flow rate standard
- Prolonged periods of nonuse

Legitimate factual questions about claims were simply not pursued under the Water Court's old verification procedures. The Water Court often did not allow the DNRC to follow up on problems with claims. Accordingly, there are no remarks reflecting legitimate problems with claims, ones that would have been investigated by the DNRC had it not been held to the Water Court's verification procedures. There is no way for most potential objectors to know about problems with claims unless problems identified in the verification process are somehow remarked in the decrees. The majority of objections to date have been based on remarks. Because the Water Court prohibited the DNRC from identifying numerous legitimate issues, many problem claims do not contain remarks that could serve as the basis for an objection or having the claim called in on the Water Court's own motion.

Thus, the Water Court has applied varying examination procedures and guidelines which have been applied in the development of relevant factual data during the adjudication

(page 20). There have been major changes between basins and even within basins in examination procedures and guidelines which substantially altered how claims were treated and determined to what extent claimants were required to participate in the process. The draft report concludes that a policy of uniformity in examination procedures and guidelines is desirable but not legally required. The DNRC specifically disagrees with this conclusion. The report makes a conclusion that there is no legal problem inherent in the use of differing procedures and guidelines in the adjudication process because claimants are afforded the opportunity to have their own rights heard before the Water Court and to object to claims of others. They support this by referencing State ex rel. Greeley which states that the statutory scheme of filing a claim and allowing for objections to other claims is adequate on its face. However, in this case we are concerned with implementation of the statute.

Due process is denied when the Water Court treats persons with similar interest in a dissimilar fashion. Using substantially different examination procedures and guidelines between basins and even between claimants within a single basin is not merely procedural but has a substantive effect on how those claims are treated. For example, the report notes that certain guidelines are used to set initial parameters for determining the reasonableness of the claim. Once established these guidelines are used to determine which claims will be further investigated, and in many instances which claims were gray area remarked. In some basins claims were automatically changed based on these "somewhat arbitrary" (page 29) guidelines and in other basins that same aspect of the claim might be decreed without even being further investigated. This disparate treatment in a general adjudication violates due process. At the very least, it is unfair to Montanans. They were not treated equally in this adjudication and they should not be forced to go to Court due to unequal treatment.

4. COMMENT - page 4, Summary No. 11 on claimant's access to information.

Summary No. 11 of the draft evaluation reads:

11. We found that claimant's access to Water Court decrees and other information is adequate.

Claimants' access to water court decrees is adequate in that decrees are located at the local water rights field office, the clerk of court's office for the counties involved, the Water Court, and the DNRC central office in Helena. Access to "other information" is adequate for the first decree issued in a basin but is not adequate for subsequent decrees. The centralized record system is comprised of the original claim form and documentation submitted by the claimant, the computer record

system, and a microfilm record of each claim file. The microfiche record of claims is properly updated during the examination phase and prior to the first decree for a basin being issued. But for subsequent decrees in the same basin, the complete record of changes to water rights exists only at the Water Court. Such "other information" as Water Court ordered changes, claimant's pleadings and evidence, stipulations and negotiated agreements with the Water Court are not allowed by the Water Court to be a part of the microfiche record until the next decree issuance is completed.

In recent correspondence from the Water Court (March 1, 1988), it indicated that claim files (including the Master's Reports) will be returned to the DNRC for microfilming at the end of each decree stage. The efficacy of this recent directive has not been tested as no subsequent basin decree has been issued in 1988. There are only four basins (38H, 39H, 42L, 40P) where subsequent decrees have been issued to date. In these basins the microfiche record was not updated prior to the subsequent decree being issued. This means that anyone reviewing these decrees under the short review deadline had no record at the clerks of court, the water rights field offices, or the DNRC Helena office for researching changes to water rights made by the Water Court during the objection process. Only the Water Court had the record of changes to these water rights. The DNRC therefore feels the claimant's access to Water Court decrees and other information is not adequate.

5. COMMENT - page 4, Summary No. 14 on the Water Court docket system; pages 35-36 of text of report.

Summary No. 14 of the draft evaluation states:

14. We found the Water Courts' claim index and docket control systems to be exemplary.

Page 36 of the draft evaluation states, "Considering that thousands of claims are pending, docket control and follow-through on the claims could be a model for other courts."

The critical question to be answered here, however, is whether the Water Court in this statewide general stream adjudication has a system that allows litigants to be aware of recent or pending cases that may affect them. An attorney should be able to find out if there are any recent or pending cases concerning the issue involved in his case. For example, the binding effect of prior decrees. If the issue has been ruled on, a person should be able to obtain a copy of the Water Court precedent. If the issue has not been ruled on but a case is just being consolidated for that purpose, water users should be able to find out about the case and decide if they want to intervene. Since the Water Court will hopefully follow

precedent when it decides cases, it is not enough to say that a chance to relitigate these same issues in other cases is the remedy and so there is no problem. The December 11, 1987, Study Design states at page 8 that the question to be answered is:

Does the Water Court have an index of claims and cases or a docket system sufficient to provide public notice of its decisions?

The DNRC is not aware of any such Water Court system that is sufficient to provide the public and practicing attorneys notice of its decisions. Attachment A is an example of a notice from the State of Washington's adjudication that provides notice to water users and attorneys of significant documents filed in cases. This type of notice could be used as a basis for a Water Court notice that would also include notice of cases or issues decided, and important issues that are pending. Such a monthly notice could be sent to attorneys and could be posted in appropriate public places.

6. COMMENT - page 6, Summary No. 16 on decretal errors; pages 20, 47 of text of report.

Conclusion No. 16 of the draft evaluation states:

16. We recommend measures for legislative adoption to protect against injury to other water users which might result from decretal errors not corrected through the judicial process.

The following statement is made at page 20 of the draft evaluation:

While these [inflated claims] may be valid concerns, the limitation of water rights in future changes of use or in future modifications of facilities, as recommended in subsection D.1. below, can remedy much of the harm from erroneous claims. (emphasis added).

Subsection D.1 states in part at page 47 as follows:

In light of the principles of the appropriation doctrine concerning changes of rights, we suggest that the legislature consider additional legislatively created mechanisms to explicitly require that changes of rights, including the replacement, enlargement or extension of existing decreed structures, must be approved through a process involving DNRC investigation and fact finding and judicial review of DNRC's findings for determination of historical use and injury.

Without really stating how accurate Montana's adjudication is, against charges that it is wholly inaccurate, the suggestion of an administrative change proceeding is put forth as a remedy. The problem is, though, that changes constitute a very small part of the water right actions taking place in Montana. And if DNRC investigation and fact finding is recommended later, why isn't more DNRC investigation warranted now in the adjudication? It would be better to spend the time and money now to issue accurate decrees instead of requiring a water user with a 1988 final decree, in a change proceeding the very next year, to litigate the extent of their historic use despite a final decree which just recently decreed that right. The Study Design states at page 6 that the following question will be analyzed: "Is adequate claims examination being undertaken by the DNRC, particularly in regard to field inspections?" The issue of the amount of DNRC examination, particularly field investigations, is really never directly addressed by this report.

A critical issue in this adjudication is what happens when a water commissioner is put on a stream with an inaccurate final decree containing inflated flow rates and acreage. With the water decreed to irrigate the excessive acres, no "change" is needed for the water user to start irrigating that land for the first time. Thus, it is difficult to understand how change proceedings can remedy "much" (page 20) of the harm from erroneous claims. And as the draft evaluation also admits, with few measuring devices, the use of a "forfeiture mechanism would appear to be practically unrealistic" (page 47). Thus, if Montana's decrees are inaccurate and change proceedings and forfeiture provisions will not remedy the inaccuracies, what will? The essence of the debate and litigation over the adjudication centers around the accuracy issue and the above-stated ramifications of inaccuracy. If the decrees are inaccurate and provisions exist only for correcting clerical errors in final decrees, the simple truth is that everyone will just have to live with all the problems caused by inaccurate decrees. On streams where few or no problems previously exist, an inaccurate decree granting exaggerated or bogus water rights leads to instant trouble. At the very least, it can require litigation. At worst, it can result in the loss of water rights that were more secure than before an inaccurate final decree.

7. COMMENT - page 6 Summary Finding No. 18, and page 44 on accuracy.

Summary No. 18 of the draft evaluation states:

We conclude that neither the appropriation doctrine nor the present statutory procedure require the entry of decrees evidencing water rights with 100% accuracy.



No one claimed that final decrees in the adjudication have to be 100% accurate. That is not the issue. Final decrees in the adjudication must be sufficiently accurate to ensure that the process is adequate under the McCarran Amendment and results in decrees adequate to allow the state to move forward in administering existing water rights.

An adjudication will not be adequate under the McCarran Amendment if "the state proceedings [are] in some respect inadequate to resolve the federal claims". Colorado River Water Conservation District v. U.S., 424 U.S. 800 (1976). This means that not only must the statutory scheme meet the McCarran standard as Montana's was confirmed in the Greeley case, but it also means that the implementation of the statutory scheme must result in decrees sufficiently accurate to meet federal standards. Therefore, the question is not whether the decrees are 100% accurate but it is whether the decrees are sufficiently accurate to meet federal standards and to allow for state administration. This report concludes on page 44 that:

Montana's adjudication system, is implemented under both the old verification procedures and the new examination rules, as produced and continues to produce reasonably accurate determinations of water rights and that adequate remedies are available to address the inaccuracies which inevitably result in any adjudication process.

However, the study does not cite any documentation to support this finding. Neither does the report identify the level of accuracy required to be "reasonably accurate" (page 44). In examining water right claims the Department has aimed for a level of accuracy on irrigation acreage of within 7%. Although a specific percentage has never been identified for a level of accuracy to meet McCarran Amendment standards, Frank Trelease in "A Water Protection Strategy for Montana", identified that a 90% level accuracy may be sufficient. The report seems to imply that a 30% variance or even greater may be a sufficient level of accuracy (page 48), but supplies no documentation to show that the adjudication even has a level of accuracy approaching 70%. Indeed, the only documentation within the report concerning this issue is the attorney survey in appendix 2, which indicates that the majority of the attorneys surveyed consider the decrees entered by the Water Court have an accuracy of less than 50% (page II-6). The purpose of the study conducted for the Water Policy Committee was to determine whether the adjudication process was being implemented so as to result in a fair and accurate adjudication. A finding that the adjudication does not have to be 100% accurate coupled with a bald assertion that the adjudication system has produced reasonably accurate determinations of water rights does not address the initial question raised by the Water Policy Committee.

The draft evaluation on page 44 states in part as follows:

... however, we have found that Montana's adjudication system, as implemented under both the old verification procedures and the new examination rules, has produced and continues to produce reasonably accurate determinations of water rights .... (emphasis added).

This statement differs from the statement on the bottom of page 47 that "questions as to the accuracy of claims and decrees, is not subject to definitive resolution ..." If the adjudication has produced "reasonably accurate determinations of water rights," just what does "reasonably accurate" mean? The entire controversy surrounding the adjudication comes down to the issue of the accuracy of decrees, but that question is not answered here. This study states they are not 100% accurate (p. 46), that they are reasonably accurate (p. 44), that their accuracy is not susceptible to precise definitive resolution (p. 47), that adequate remedies are available to address the inaccuracies which inevitably result (p. 44), and that if inaccuracies do exist a forfeiture provision to correct them appears to be "practically unrealistic" (p. 47). From these statements it is impossible to know any more about the accuracy of Montana's adjudication than was known before. Whether Montana is getting its moneys' worth out of this adjudication by having accurate final decrees remains unresolved.

8. COMMENT - page 6, Summary No. 19 on ample opportunity existing for contesting claims; page 36 on gray area remarks.

Summary No. 19 of the draft evaluation states:

We conclude that the present system provides ample opportunity for claims to be contested without the creation of a mandatory adversarial system.

The "present" system is described in part on page 36 as follows:

The DNRC plays a vital role in verifying the accuracy of claims where additional proof is required. Field investigations and discussions with the claimants usually identify the problem for resolution by the Court. In those areas where a resolution is not achieved, "gray area" remarks are noted on the decrees. This occurs when the Court has insufficient information and facts to adequately resolve a problem which has been identified. Pursuant to instructions accompanying preliminary decrees, the burden of resolving the gray area remarks is normally left to the claimant. In review of certain preliminary

decrees, the gray area remarks allow an interested person to immediately identify the unresolved problem areas. This provides valuable insights to areas concentrated on by the Water Court and DNRC.

The flaw with the above analysis is that it describes a process that is no longer followed. Gray area remarks were used under the old verification procedures. With the new Supreme Court Water Rights Claim Examination Rules the DNRC will make an examination report to the Water Court. The Water Court essentially has to decide on which issues from the examination report it will hold a hearing. Will the Water Court after it has received the DNRC examination report and before the issuance of a temporary preliminary decree set every claim for hearing where there is a difference between the claim and the DNRC report? Or will some discrepancies be so de minimis that no hearing will be held? The issue here is whether the Water Court should, as a matter of due process, equal protection, or just plain fairness, let everyone know what the cutoffs are where it will require further proof of a claim and where it will not. The question to be analyzed as set out in the Study Design reads:

"Does or should the Water Court have criteria for determining which claims to call up for further proof?"

If the Water Court does not have such criteria, then it will be operating with an arbitrary system where each Water Master will be deciding when a claim should go through "as is" and when a hearing should be held to explain a certain degree of discrepancy. Maybe one Water Master will feel a 7% or even greater difference in claimed versus verified acres should warrant further proof, while another Water Master might feel greater variation requires further proof. This issue must be addressed.

It is also important for claimants when they receive their abstract and the DNRC report to know what is expected of them. To date just how this will work has not been made clear. A claimant should know if his claim will go through "as is" on each element, or precisely which elements the Water Court will call in on its own motion.

The other issue that needs to be addressed here is the propriety of the Water Court's calling claims in on its own motion leaving claimants without an adversary. Just saying a mandatory adversarial system is not necessary does not answer the critical question of whether the Water Court can arbitrarily call claims in on its own motion. Many attorneys wonder how this system will operate and wonder how they can conduct

discovery to find out why there is a problem with the claim. Since the rest of the adjudication is tied to this current method, this issue must be addressed.

9. COMMENT - page 7, Summary No. 22 on unadjudicated federal and tribal claims in final decrees.

Summary No. 22 of the draft evaluation states:

22. We conclude that the final Powder River Decree is not final and binding as against unadjudicated federal and tribal claims.

The DNRC also understands that, in addition to unadjudicated federal and tribal reserved rights in the Powder River final decree, there are other reserved rights which have not been included in other decrees issued by the Water Court. The preliminary decree for Big Dry Creek (Basin 40D) was issued on September 28, 1984. This decree makes no mention of reserved rights, even though federal reserved rights need to be compacted with the U. S. Fish and Wildlife Service on the Charles M. Russell Wildlife Refuge and the U L Bend Wildlife Refuge. According to Mont. Code Ann. § 85-2-311(c) a preliminary decree shall be based on "the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights." Attachment B is a February 11, 1987, memorandum prepared by the Reserved Water Rights Compact Commission staff on the basin location of federal reserved rights.

10. COMMENT - page 28 on the efficiency of the Water Court.

The draft evaluation at page 28 states:

There have been over 203,000 claims filed, of which approximately 130,000 are in the process of being included in "temporary" preliminary decrees or preliminary decrees.

So far 69,592 claims have been entered into temporary preliminary, preliminary, or final decrees as part of the S.B. 76 general adjudication. This does not include the 10,302 declarations of water rights examined and prepared for decree by the DNRC in the Powder River Basin. Some partial examination of 35,509 claims has proceeded in other basins using the former Water Court verification procedures. Therefore, to suggest that 130,000 claims are in the process of being included in some type of decree is misleading. A more reasonable statement would be that 69,592 claims have been entered into some type of decree using the former Water Court verification procedures.

11. COMMENT - page 30 on Water Court procedure.

At page 30 of the draft evaluation states:

In conclusion, we cannot suggest any meaningful improvements in the Water Court's administration to increase its efficiency.

The DNRC would like to caution that Water Court procedures must be exercised in such a fashion that the Water Court's zeal for efficiency does not circumvent a claimant's or an objector's adequate opportunity for hearing. Specifically, the DNRC is concerned by the term "informal hearing". Additionally, the report states that "rules of civil procedure apply [to informal hearings] but are often not invoked by the Court or the parties." (page 29). The Water Court is a formal court with the judicial powers of a district court. Statutory waiver of the application of the rules of civil procedure and evidence exist only for certain administrative proceedings. No statutory provision provides for informal hearings before the district courts (Water Court). On the contrary, the rules of civil procedure and rules of evidence specifically apply to the district courts and specifically apply to the Water Court by Supreme Court Water Right Claims Examination Rule 1.II.(2). Therefore, the DNRC takes exception to the implication that the rules of civil procedure apply to the Water Court only if invoked by the Court or the parties. The rules of civil procedure establish a process for the exchange of information and facilitate a fair and equitable judicial resolution of cases. The rules of civil procedure exist to assist litigants, whether represented by an attorney or not, and should not be viewed as a hardship on the Court. Ad hoc application of the rules of civil procedure is contrary to law and leads to confusion in the handling of cases.

The DNRC realizes non-attorneys unfamiliar with the judicial system are involved in many of the Water Court proceedings. Claimants must be aware that they have a right to present evidence and cross-examine witnesses. The Water Court should not try to circumvent the right of a claimant to a hearing by having an "informal" hearing in the guise of a court-ordered "status conference". Informal hearings exist for administrative hearings, Mont. Code Ann. § 2-4-604; they do not exist in the district courts. If the legislature had wanted informal administrative hearings in this adjudication, it would not have gone to the lengths it has to set up a purely judicial proceeding.

"Efficiency" is not an end in and of itself. The goal must be the fair and equitable resolution of cases in the most efficient manner possible consistent with that goal. This is done through the proper application of court procedures including the rules of civil procedure and evidence.

12. COMMENT - page 44 on examination of federal reserved rights.

The draft evaluation on page 44 makes the statement:

We do not find that federal or Indian rights are disadvantaged by the adjudication in the state forum. Neither more, nor less stringent examination is accorded to appropriators of water rights under state law than than accorded federal and Indian water rights.

Since the present Montana Supreme Court Water Right Claims Examination Rules only address the examination of private water right claims, there is no basis for the statement that federal reserved rights are afforded neither more nor less stringent examination. No rules have been adopted regarding how and to what extent federal reserved rights will be examined. The present rules would need revision for application to reserved rights as certain aspects of water right claims, such as flow rates, are allowed to be changed based on established guidelines.

13. COMMENT - pages 26 and 45 on objections.

The draft evaluation at page 26 states, "Montana's statutory law does not contemplate filing of late objections to a preliminary decree". At page 45 the following statements are made:

Any doubt as to the inclusiveness in the totality of Montana's adjudication process would be removed upon the full notice and opportunity to litigate all claims which should be afforded at the preliminary decree stage. This notice and opportunity to litigate any and all claims prior to entry of a final decree in essence makes everyone a party to the general proceedings, whether or not they have chosen to participate, and assures a comprehensive adjudication. (emphasis added).

The critical issue here is whether the Water Court can demand, as it does now, that all objections by non-reserved rights claimants must be made at the temporary preliminary decree stage or those objections are waived.

This has been a major issue of contention in the adjudication. If any and all objections can be made at the preliminary decree stage as Mont. Code Ann. § 85-2-233 provides for, then the issue is how can there be a "late objection" to a temporary preliminary decree? If water claimants can wait until

the preliminary decree is issued to file their objections, and do not waive their objections by not objecting at the temporary preliminary decree stage, the report should state and document the reasons supporting that opinion.

14. COMMENT - page 50 on the usefulness of the final decrees.

The Study Design states that one of the questions to be addressed is:

Will the decrees be helpful to water users and reduce potentials for future litigation?

The answer on page 50 speaks to the usefulness of decrees in general terms and says nothing specific about the usefulness of these decrees and whether they will reduce the potential for future litigation. The accuracy issue is involved once again. The issue here is really whether water users are better off without these final decrees if the decrees are inaccurate and those inaccuracies are memorialized in a final decree such that they can be corrected only through expensive and time-consuming litigation.

15. COMMENT - page 53 on corrections to final decrees.

The discussion on correcting clerical errors in final decrees leaves unanswered questions.

A clerical error is defined on page 53 of the draft evaluation as follows:

Traditionally, a clerical error is defined as a mistake in the judgment as rendered which is apparent from the record or other evidence and which prevents the judgment as written from expressing the judgment as rendered by the court.

Based upon the foregoing definition, then, it is difficult to understand how a decreed right that conforms to the claimed right and court judgment could be viewed as clerical. Yet, that is how most inaccurate claims have gone through the adjudication process. The record will be clear that the Water Court decreed what was claimed.

If, as many fear, Montana's decrees contain substantial numbers of substantive errors, how can they be corrected? If the answer is that substantive errors in the final decrees can only be changed by re-noticing everyone in the basin at the claimant's expense, then that should be stated and documented in the report.

Even if some inaccuracies in final decrees could be deemed "clerical" errors, is there a time limit on making those corrections? If not, someone reviewing a final decree will never know with certainty whether the rights listed are susceptible to change because of clerical errors.

The example used on page 54 regarding clerical errors is unclear. If a clerical error exists as to a point of diversion so that the point of diversion in actuality is where it always has been, how could correcting it as a clerical error "affect the decreed rights of other diversions" or how could correcting a place of use on paper "alter the pattern of the return flow of water for other rights?" A clerical error should have no substantive effect. The above example of an error seems to be more substantive than clerical in nature. The draft evaluation should further analyze what specific types of errors are clerical and which are substantive. Is a clearly erroneous point of diversion in a final decree that conforms to the point of diversion in a water rights claim clerical when it was specifically decreed that way and nothing in the record contradicted its correctness?

The Study Design specifically states the question to be answered is, "If final decrees are found to be inaccurate, what statutory process is to be followed to correct the errors." A discussion of that process with the above questions in mind, as well as a discussion of what constitutes proper notice in the eyes of the consultants, is in order.

16. COMMENT - page 60 on legislation regarding late claims.

The draft evaluation at page 60 proposes that:

... the legislature could consider remedial legislation providing that late-filed claims may be adjudicated but shall have priorities junior and inferior to the priorities for all rights adjudicated for claims which were timely filed.

This suggestion needs to discuss the implications of adjudicated late claims to Montana permit holders and applicants. A permit applicant surveying a river basin may feel after a review of the temporary preliminary decree that he should go ahead and apply for a water permit. After he applies for a permit, receives it, and invests in land or equipment, he could find that late claims he was not aware of had been received and adjudicated and he is now so junior his proposed use is not viable. As a result, the certainty and finality sought from an adjudication is not present. Without a cutoff date for filing claims, the entire water rights system is fraught with uncertainty.



The relationship between legislation to allow late claims and Montana's permit system needs to be further discussed, as well as an ultimate cutoff date for claims.

17. COMMENT - page 61 on prima facie.

The draft evaluation states on page 61 that:

The Water Court has applied the prima facie evidence statute by treating those water right claims as evidence adequate to meet the burden of proof required to grant the claim unless other evidence rebuts the facts stated in the claim. Thus, if the contents of a complete water right are not rebutted through DNRC verification or an objection by some other party, the water right is decreed as claimed.

Not all aspects of claims, however, are given prima facie status. For example, a flow rate standard of 17 gpm/acre is applied to claims and they are changed accordingly--unless something is found to justify a higher rate. So it is not entirely accurate to say that the contents of a complete water claim if not rebutted through DNRC verification or objection by some other party are decreed as claimed. In fact, for the first 18 basins the Water Court relied extensively on DNRC verification and changed claims accordingly, leaving the burden on the claimant to object if he did not agree with the DNRC verification changes. That abruptly changed with the Willow Creek basin and the problem thereafter was that DNRC's verification information was not being used by the Water Court. Claims were granted as is and "gray area remarks" were added to them. The DNRC had not been objecting to claims and the Water Court was not calling in claims on its own motion or otherwise making use of the verification information. As a result, the accuracy of decrees began to be questioned. Lawsuits were eventually filed and the major provision of the February 1986 Stipulation was that the verification procedures would be strengthened, field investigations would be allowed, and DNRC's examination information would be used. If the DNRC's examination information was not used, the Water Court would have to say why it was not.

Therefore, based on the foregoing discussion, the question is whether DNRC claims examination and field investigations are necessary and how will the information be used. The Water Court presented its view to the 1987 Montana Legislature that DNRC examination of claims was not necessary. To the extent claims were examined, that was said to be "useful, but not necessary". The necessity of the DNRC's examining claims in spite of the prima facie statute should be made clear.

Finally, pages 61-62 discuss how the prima facie statute "provides certainty of claimed water rights" and how there is a "useful purpose" in having claims accorded prima facie effect until the entry of the final decree. That "useful purpose" is not explained and is not apparent. Why isn't it enough that a claim is afforded prima facie treatment until it is overcome by other competent evidence? And if the Water Court used DNRC verification information for the first 18 basins to change claims accordingly, which was a very efficient process, why couldn't that process be used again? On page 63 the draft evaluation states that type of process would be "inappropriate". Why would that be inappropriate if legislation was changed to allow it? Since that process was used in the first 18 basins, how does it affect the validity of those decrees if it is now considered inappropriate?

18. COMMENT - page 62 on final decrees.

The draft evaluation at page 63 states only final Water Court decrees are subject to administration. However, the Study Design posed the following questions:

What is the legal effect of the various decrees previously issued by the Water Courts. Can water rights in non-final decrees be administered by water commissioners and, if not, what legislative changes would be required to permit such administration?

The draft evaluation does not address what legislative changes would be required to permit administration of non-final decrees. Is it not possible through legislation to have non-final decrees binding on non-federal reserved rights claimants if the right to appeal from temporary preliminary decrees was provided for and all such appeals had been exhausted?

Those choosing not to object at the temporary preliminary decree stage could do so at the preliminary decree stage, but they would be subject to administration of the temporary preliminary decree in the meantime. This type of arrangement would seem to give individuals an incentive to object at the earliest possible date in the adjudication. Additionally, temporary preliminary decrees could be used to administer streams between water users listed in the decree pending the conclusion of the compacted or adjudicated federal reserved rights and the issuance of a final decree.

19. COMMENT - page 63 on the 1986 Stipulation.

The following statements are made at page 63 of the draft evaluation:

The Montana Supreme Court has not expressly approved the 1986 stipulation, and we are unable to conclude that it has implicitly done so. Thus, the stipulation must be viewed as a contract or an attempt at contract. It is questionable whether the Water Court has the capacity to contract with litigants concerning how it will proceed generically in an adjudication. Such an agreement would not be within the context of a pre-trial order or other court order entered under the rules of civil procedure which binds the court unless modified to prevent manifest injustice.

The issue of the binding effect of the Stipulation has not been addressed. The statement is made that it has not been "accepted" by the Montana Supreme Court. Why must it be accepted by the Montana Supreme Court to have a binding effect on the procedures of the Water Court? Paragraph 46 of the Stipulation only states that if the Stipulation is accepted by the Montana Supreme Court, all or portions of the petitions before the Court would be dismissed. Nowhere else in the Stipulation is there a reference to its acceptance by the Supreme Court. The fact is that all of the petitions referred to have long since been withdrawn or dismissed by the parties. Why is the Stipulation without Supreme Court acceptance merely an "attempt at contract"? The Water Court and the various parties were in litigation with the Water Court over Water Court procedures, not anything affecting the substance of a particular decision. Since the litigants were asking the Montana Supreme Court to supervise the Water Court's procedures, in a proceeding unique to only Montana, and the Water Court agreed to the Stipulation and the Montana Supreme Court has never rejected it, why is it only an attempt at contract? Why isn't an agreement over revised procedures arising out of a unique writ of supervisory control lawsuit binding on the signatories? In return for the Water Court's agreeing to revise its procedures, the parties agreed to dismiss their actions, which they did. What provisions of the Stipulation are not in accordance with Montana Law? Certainly the Water Court after involving itself in extensive negotiations would not have signed an agreement it felt did not comport with Montana Law.

Since the 1986 Stipulation settled massive litigation and spared the Montana Supreme Court endless judicial scrutiny of the adjudication, the DNRC agrees there is no way it can be compared to a pretrial order or other irrelevant court order.

The above questions still remain. This report states only that it is "questionable" that the Water Court has the capacity to contract with litigants concerning how it will proceed generically in an adjudication. Straightforward answers to the above questions are needed regarding an agreement by the Water

Court as to how it will change its procedures. Since many aspects of how claims will be handled are contained in that Stipulation, a cogent analysis is needed to determine whether the 1986 Stipulation has any validity.

# ATTACHMENT A

## YAKIMA RIVER BASIN

### WATER RIGHTS ADJUDICATION

### NOTICE

March 1, 1988

No. 35

**TO ALL PARTIES AND ATTORNEYS OF RECORD:**

This notice is published monthly pursuant to Pretrial Order No. 3 filed April 19, 1985 by Judge Walter A. Stauffacher of the Yakima County Superior Court in the matter of the State of Washington, Department of Ecology, Plaintiff, v. James J. Acquavella, et al, Defendants, Cause No. 77-2-01484-5.

**Significant Documents Filed at the Yakima County Superior Court  
Between January 23, 1988 and February 22, 1988**

Doc. #	Date Filed	Document Description	Sponsor
3643	1-25-88	Notice of Intention to Withdraw, Attorney Stanley S. Pratt for Claimants Jake and Sue Bryan (Claim No. 1164)	Stanley S. Pratt, Attorney at Law
3644	1-25-88	Amended Claim For Water Right Claim No. 1169 (William Trudell)	William Trudell
3645	1-26-88	Motion to Join Additional Parties Re: Homer W. Marney and Anna M. Marney, a portion to William S. Lawrence et uxer (Claim No. 1604)	Homer W. Marney and Anna M. Marney
3646	1-26-88	Order Granting Motion to Join Additional Parties Re: Homer W. and Anna M. Marney, a portion to William S. Lawrence et uxer (Claim No. 1604)	Walter A. Stauffacher, Judge
3647	1-26-88	Motion to Join Additional Parties Re: Homer W. Marney and Anna M. Marney, a portion to Timothy L. Fauth et uxer (Claim No. 1604)	Homer W. Marney and Anna M. Marney
3648	1-26-88	Order Granting Motion to Join Additional Parties Re: Homer W. and Anna M. Marney, a portion to Timothy L. Fauth et uxer (Claim No. 1604)	Walter A. Stauffacher, Judge
3649	2-1-88	Motion to Intervene (Verl and Margaret Tilbury) (Subbasin No. 19)	Richard C. Smith, Attorney at Law
3650	2-1-88	Motion to Intervene (Vern and Elva Keep) (Subbasin No. 19)	Richard C. Smith, Attorney at Law
3651	2-1-88	Motion to Intervene (James T. and Pat Shafer) (Subbasin No. 19)	Richard C. Smith, Attorney at Law
3652	2-1-88	Motion to Intervene (John L. and Donetta M. Peppers) (Subbasin No. 19)	Richard C. Smith, Attorney at Law
3653	2-8-88	Referee's Order on Post-Hearing Schedule and Availability of Testimony and Exhibits (Sub.19)	William R. Smith, Referee
3655	2-8-88	Yakima River Basin Water Rights Adjudication Notice No. 34	Department of Ecology, Charles B. Roe, Jr. Sr. Asst. Atty. General
3659	2-9-88	Notice of Substitution of Ownership Interest of Freda L. Oida, Deceased (Claim No. 1553)	Kenneth D. Beckley, Attorney at Law
3677	2-18-88	Referee's Amendatory Order on Scheduling of Evidentiary Hearing (Sub. No. 1-Cle Elum Lake)	William R. Smith, Referee
3640 through 3675	2-10-88	Verbatim Report of Proceedings Re: Hearing on Subbasin No. 19, Days 1 through 16	Sally Ann Littell, Court Reporter
3676	2-16-88	Verbatim Report of Proceedings Re: Subbasin No. 1, Prehearing Conference	Sally Ann Littell, Court Reporter
3682	2-19-88	Certification of Affidavits Re: John & Harriet Coeckler (Court Claim No. 1523)	Donald Bond, Attorney at Law
3683	2-19-88	Affidavit of Kim Lea Olson Re: Kelley-Lowrey Ditch (Court Claim No. 1392)	Kim Lea Olson
3686	2-19-88	Addendum to Exhibit 7 Re: Subbasin No. 19, Lower Naches River, CLARK DITCH COMPANY	Walter E. Weeks, Jr. Attorney at Law

3685	2-19-88	Notice of Issue of Law/Memo for Motion Docket (G. Alan Hires and Rocky Mountain Faith Mission)	J. Jay Carrell, Attorney at Law
3686	2-19-88	Notice of Hearing Relating to Proposed Order Modifying Plaintiff's Report to Referee--Subbasins 16, 17, and 19	Department of Ecology, Charles B. Roe, Jr. Sr. Asst. Atty. General
3687	2-19-88	Plaintiff's Report To Referee--Subbasin 30 (Manford)	Department of Ecology, Nedra Adelsman
3688	2-19-88	Plaintiff's Report To Referee--Subbasin 31 (Richland)	Department of Ecology, Nedra Adelsman
3689	2-22-88	Notice of Hearing Relating to Motions to Intervene, to Allow Reopening of Evidence, and Modify Plaintiff's Report to Referee (Sub. 16, 17 & 19)	William R. Smith, Referee

CALENDAR

March 15, 1988 Hearing on Further Stay of Discovery of Indian Claims, 9:30 a.m., Yakima County Superior Court, Yakima County Courthouse, Department No. 2, North Second and East "B" Streets, Yakima, Washington

March 29, 1988 Hearing Relating to Motions to Intervene (Subbasin No. 19), Motion to Allow Reopening of Evidence (Subbasin No. 16--G. Allen Hires and Rocky Mountain Faith Mission), and Proposed Order Modifying Plaintiff's Report to Referee (Subbasins No. 16, 17 and 19), 9:30 a.m., Yakima County Superior Court, Courtroom 313, North 2nd and East "B" Streets, Yakima, Washington.

March 30, 1988 Moved From March 16, 1988. Hearing on the claims relating to Subbasin No. 1 (Cle Elum Lake) -- 9:30 a.m., Kittitas County District Court, 301 W. First, Cle Elum, Washington.

This notice will be mailed on the first working day of each month to inform you about significant documents that have been filed at the Yakima County Superior Court in conjunction with this case. The notice will also contain information concerning trial dates, times, and locations. If there is no activity during the previous month, no notice will be sent.

All documents listed will be available for viewing or copying at the Yakima County Clerk's Office; North 2nd & East "B" Streets, Yakima, Washington. Office hours are between 8:30 a.m. and 5:00 p.m. - Monday through Friday. There is a fee for each page copied.

Documents filed with the Court on or before the 22nd day of each month will be included in the monthly notice mailed on the first working day of the next month. If the 22nd falls on a holiday or weekend, the last day for filing would be the next business day. Documents filed after that date will be included in the following month's notice.

The court has increased the response period to thirty (30) days after notification for matters which, under the civil rules, require notice to all parties. Because of this, all parties should be aware that documents filed on or after the 23rd of the month may not be acted upon for over two months after their filing. Consequently, it may be important to file all documents on or before the 22nd day of each month.

RECEIVED  
MAY 11 1988  
ATTORNEY GENERAL'S OFFICE  
ECOLOGICAL DIV.  
OLYMPIA

Department of Ecology  
Adjudication Section  
Mail Stop PV-11  
Olympia, WA 98504-8711

ADDRESS CORRECTION REQUESTED

FIRST CLASS MAIL

Mr. Charles B. Roe, Jr., Sr. Asst.  
Temple of Justice  
Mail Stop AV-21  
Olympia, WA 98504  
X0126

MEMORANDUM

February 11, 1987

TO: Marcia Rundle  
Staff Attorney/Program Manager

FROM: Greg Ames, Agricultural Engineer G.A.  
Lynda Saul, Hydrologist *LS*  
Susan Cottingham, Research Specialist *SC*

SUBJECT: Basins Including federally reserved water right claims

1. USDI/BLM - Wild and Scenic Missouri River: 41T, 41R, 41S, 40EJ
2. USDI/National Park Service:
  - a. Glacier National Park: 40T, 76I, 76LJ, 40F, 41L, 41M
  - b. Yellowstone National Park: 41F, 41H, 43B
  - c. Big Hole National Recreation Area: 41D
  - d. Custer Battlefield National Monument: 43O
  - e. Big Horn Canyon National Recreation Area: 43P
3. USDI/BIA; Federally Reserved Indian Reservations:
  - a. Flathead Indian Reservation: 76LJ, 76L. NOTE: An interbasin transfer exists from 76F to 76L, North Fork Flathead via canal into One Mile Pond, then diverted into Upper Jocko Lake.
  - b. Blackfeet: 40F, 41L, 41M, 40T
  - c. Rocky Boy's: 40H, 40J
  - d. Fort Belknap: 40J, 40I, 40M, 40EJ
  - e. Fort Peck: 40Q, 40S, 40R, 40O
  - f. Northern Cheyenne: 42KJ, 42A, 42C, 42B
  - g. Crow: 42B, 42A, 42KJ, 43P, 43O, 43Q, 43E, 43N, 43D
  - h. Turtle Mountain: 39E, 40E, 40EJ, 40H, 40I, 40J, 40K, 40L, 40M, 40Q, 40R, 40S, 41P, 41T
4. USFWS
  - a. CMR/UL Bend NWR: 40EJ, 40E, 40D, 40F
  - b. National Bison Range: 76L
  - c. Benton Lake: 41Q
  - d. Bowdoin NWR: 40M
  - e. Black Coulees: 40J
5. USDA
  - a. Miles City Range and Livestock Experiment Station: 42KJ, 42C
  - b. U.S. Sheep Experiment Station: 41A
6. USDA Forest Service
  - a. Beaverhead: 41A, 41B, 41C, 41D, 41F, 41G, 41H, 76E, 76G, 76H
  - b. Bitterroot: 41D, 76E, 76F, 76G, 76H, 76M
  - c. Custer: 39E, 39F, 39FJ, 42B, 42C, 42J, 43B, 43BJ, 43C, 43D, 43P
  - d. Deer Lodge: 41C, 41D, 41E, 41F, 41G, 41I, 76E, 76G, 76GJ, 76H
  - e. Flathead: 41K, 41M, 41O, 41U, 76C, 76D, 76F, 76I, 76J, 76K, 76L, 76LJ, 76N

Memorandum

February 11, 1987

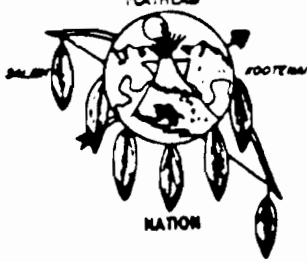
Page Two.

- f. Helena: 41E, 41I, 41J, 41QJ, 41U, 76F, 76G
- g. Lewis and Clark: 40A, 40B, 40C, 41J, 41K, 41M, 41O, 41Q, 41QJ, 41R, 41S, 43A, 43BV, 76F, 76I, 76J
- h. Lolo: 41K, 41O, 41U, 76F, 76K, 76L, 76LJ
- i. Kootenai: 76B, 76D, 76C, 76LJ, 76N
- j. Kaniksu: 76N
- k. Gallatin: 41F, 41H, 43B, 43D, 43BJ, 43A, 43BV, 40A, 41I

Conclusion: The following eleven basins do not involve federally reserved water rights: 41N, 43QJ, 42I, 42K, 42L, 42M, 40N, 40P, 39G, 39H, 38H

Basin 40G (Sage Creek) is presently involved in a boundary dispute with an Indian Reservation and it has not been determined whether or not a federally reserved water right exists in Basin 40G.





THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION

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Joe Dog Felsman  
Pat Lefthand

August 17, 1988

Via Federal Express

Attention: Bob Thompson  
Water Policy Committee  
Environmental Quality Council  
Capital Station Room 432  
Helena, MT 59620 Phone: 444-3742

RE: Evaluation of Water Rights Adjudication Process.

Dear Chairman Galt:

On behalf of the Confederated Salish and Kootenai Tribes herewith is attached written comment on the draft report submitted by Saunders, Snyder, Ross & Dickson, P.C. from Denver, Co.

The Confederated Tribes appreciate the opportunity to comment on the draft report entitled "Evaluation Of Montana's Water Rights Adjudication Process," and hope that the Committee will find our thoughts helpful.

Sincerely,

Daniel F. Decker  
Tribal Attorney

James Goetz  
Goetz, Madden, & Dunn, P.C.  
Legal Counsel for the  
Confederated Salish and  
Kootenai Tribes

cc: via Federal Express to Saunders, Snyder, Ross & Dickson

COMMENTS ON THE DRAFT  
"EVALUATION OF MONTANA'S WATER RIGHTS  
ADJUDICATION PROCESS"  
BY THE CONFEDERATED SALISH & KOOTENAI  
TRIBES OF THE FLATHEAD RESERVATION, MONTANA

TO: Water Policy Committee  
Honorable Senator Jack Galt, Chairman

These comments are submitted by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, (hereinafter referred to as "Tribes") on the draft report prepared by Jack Ross of Saunders, Snyder, Ross & Dickson, P.C., entitled "Evaluation of Montana's Water Rights Adjudication Process."

As the committee members know, the Tribes are currently in the process of negotiation with the Water Rights Compact Commission. Should the Tribes not reach a compact with the Commission, then their interests are vitally affected by the accuracy and adequacy of the water adjudication procedures. Even if the Tribes are able to reach a compact with the Commission, they may be affected by Montana's water adjudication procedures in that there may be problems integrating a compact into a final decree. Moreover, the Tribes are generally interested in seeing an adequate and accurate adjudication for the State of Montana.

The Tribes find the report disappointing in terms of rigor. The discussion of methodology is superficial, there is nothing in the report regarding the qualifications of the preparers, and, on many issues, the explanation concerning the conclusions

reached is unsatisfactory. Even though the Tribes have played an important role on Indian water rights issues in Montana, no substantial effort was made by Saunders, Snyder, Ross & Dickson to ascertain our views.

## I.

### SEPARATION OF POWERS ISSUES

The draft report purports to discuss, under the category "DNRC Roles, Practices, and Relationship with the Water Court," the constitutional "separation of powers" issues which have been raised with respect to the Water Court. See pp. 12-14 Draft Report. The draft's discussion is, however, superficial and plainly fails to come to grips with the true separation of powers issues. The real issue with respect to the Water Court, the DNRC and constitutional separation of powers is whether the Water Court is improperly intruding into the functions of the administrative agency in its practice of directing and controlling the inspection and verification powers of the DNRC. That issue is simply unaddressed by the draft report. Rather, the draft report views the separation of powers issue only from the perspective of whether DNRC's investigative inquiry unduly trammels on the judicial function. See, e.g., the Draft Report's discussion on p. 13:

The conclusions of DNRC's investigative inquiries are not binding on the Water Court or on the affected parties and therefore cannot be independently operative. The Water Court retains the ultimate power to make the factual findings from an evaluation of all the evidence before it, not just the evidence resulting from the DNRC investigation.

The analysis fails to come to grips with the question of whether the Water Court's control over DNRC violates the separation of powers principle because it is improper judicial intrusion into the executive/administrative power. This problem should be fully addressed now because it infects the entire process. A solution to the problem is relatively simple, involving only procedural readjustments in the type and degree of control the Water Court has over the DNRC. Certainly it is more prudent to initiate the easily-made changes at this point than to let the problem fester. The problem, as we have documented in comments to the Montana Supreme Court on its proposed rule adoption for the Water Court, is set forth as follows:

By the accretion of various provisions, amendments and interpretation of the Water Use Act over the past decade, the Montana legislature has created a multiplicity of overlapping, conflicting roles for the DNRC in water rights adjudication.

On their face, the statutes generate impermissible conflicts of interest for the DNRC and blur the required separation of powers among the branches of Montana government. The DNRC may not function simultaneously in the water rights adjudication as an arm of the Water Court, an impartial representative or witness for the State's interest in the fairness, accuracy, and finality of the proceedings, a claimant potentially adverse to all other claimants, and a kind of guardian an litem for other claimants.

When, in State of Montana v. Confederated Salish & Kootenai Tribes, et al., 712 P.2d 754 (1985), the Tribes argued that implementation of the various roles of the DNRC in the proceedings violated claimants' due process, the Court, in its opinion, responded as follows:

Section 85-2-243, MCA, authorized the Department to assist the Water Court, including collecting information and conducting field investigations of questionable claims. While we recognize the Act places no limits on the manner in which the Water Court utilizes the information furnished by the Department, we will not presume any improper applications of the Act on the part of the Water Court. Actual violations of procedural due process and other issues regarding the Act as applied are reviewable on appeal after a factual records is established.

The Court took the same view, again recognizing potential due process problems, in In Re the Matter of the Activities of the Department of Natural Resources and Conservation, \_\_\_\_ P.2d \_\_\_\_, 44 St.Rptr. 604, 615.<sup>1</sup>

However, the fears of the Tribes, disclosed to the Court in 1985, will have materialized prior to any adjudication of Tribal reserved rights if due process and separation of powers problems are not resolved in a timely way.

A. The Water Court's Control Over the DNRC's Administrative Activities Regarding Claims Examination and Verification Constitutes an Improper Extension of Judicial Control Over

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<sup>1</sup> The citation is to the March, 1987, decision of the Montana Supreme Court in Cause No. 86-397, in which the Court held that rulemaking associated with claims examination properly belonged with the Montana Supreme Court, not with the DNRC. The Rules were promulgated in a separate, later Order in that case.

Agency Action in Violation of Separation of Powers Principles and Due Process.

Since July 7, 1987, when the present proposed Water Court Rules were issued by the Montana Supreme Court, serious problems have arisen concerning the role of the DNRC in claims examination and verification. These problems have recently surfaced through a motion by the United States of America in the Water Court for "comparison reports and reverification," filed January 4, 1988, In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within All Water Basins in the State of Montana, in the Water Courts of the State of Montana. In that motion, the U.S. asserted that:

Many of the claims filed to date in this adjudication are inaccurate and excessive and require adequate verification in order to avoid the decreeing of water rights to which claimants are not entitled. This is true both as to basins in which temporary preliminary or preliminary decrees have already been issued, as well as basins in which such decrees have not yet issued.

U.S. Motion, p. 1. The U.S.'s motion asserted, with persuasive documentation that:

Unless the new claim examination rules are applied and at least some of the basins which have been verified under the former rules, the United State's water rights, held on its own behalf and as trustee for Indian tribes, will be prejudiced.

U.S. Motion, p. 2.

The U.S.'s motion further states that on September 4, 1987, the DNRC transmitted reports for five basins for which decrees have not yet been issued which compare the application of the

old and new claims examination procedures in those basins. The DNRC reports conclude that the application of the new rules in those basins would result in more accurate decrees. Yet, the Water Court, exercising firm control over the DNRC, has taken action to prohibit the DNRC from doing what it, in its administrative judgment, thinks is appropriate, that is the reexamination of water basins formerly examined under the previous "verification manual."

Rule 6.XIV of the proposed Water Court Rules, "Field Investigation," contains serious problems because it puts the DNRC directly under the administrative authority of the Water Court, thereby eroding the strict judicial functions of the Water Court and unduly trammeling the administrative functions of the Department. That rule provides in part as follows:

(1) The Department may request the Water Judge for authority to field investigate claims under Section 85-2-243, MCA, only when routine examination procedures and claimant contact do not clarify discrepancies of substantial importance to the claimed water right identified during the Department's examination.

Thus, the DNRC is precluded from acting on its independent judgment when it feels a field examination is necessary, but instead is required to get such permission from the Water Court. Likewise, subsection (3), which is not entirely clear, provides:

Under a blanket authorization from a water judge where it is determined by the supervisor at the field office that a field investigation is necessary or when a field investigation is otherwise authorized by the water judge, the claimant will be contacted to establish the date and time of the investigation....

Again, it is the water judge who must give permission to

the DNRC to perform its administrative duty.

The real problems, however, have come through orders and directives of the Water Court to the DNRC which are really not addressed by the proposed Rules, but should be. These are set forth below.

In 1985, the United States and other water claimants filed petitions in the Montana Supreme Court for writs of supervisory control which complained of, inter alia, inadequate verification of claims by the DNRC. United States v. Water Court, No. 85-493. The contention of inadequate verification was also advanced by the Montana Department of Fish, Wildlife and Parks in MFWP v. Water Court, No. 85-345. The verification issues raised by these petitions were not resolved by a decision of the Montana Supreme Court, rather various parties entered into a stipulation with the Water Court which was designed to address various problems, including verification. See Stipulation filed with the Court on February 19, 1986.<sup>2</sup>

Paragraph 30 of that Stipulation provided that the DNRC, in those basins where temporary preliminary or preliminary decrees had been issued, "shall file a report with the Water Court comparing the previous verification procedures with the verification procedures adopted pursuant to the Stipulation." (Stipulation, p. 12). By letter dated January 29, 1987, DNRC

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<sup>2</sup> The Tribes declined to enter into that Stipulation. After reaching that Stipulation, the various petitions for supervisory control were dismissed. There was no consent decree of the Court ratifying the stipulation.



informed the Chief Water Judge that, pursuant to the Stipulation, DNRC intended to complete the comparison reports for decreed basins before scheduling claim examination in non-decreed basins (Exhibit E, letter from Gary Fritz to Judge Lessley, pp. 1-2).<sup>3</sup> In response, the Water Court issued an order dated August 7, 1987, which barred DNRC from preparing any comparison reports for decreed basins without the approval of the Water Court, and also directed DNRC to submit to the Court a list of previously decreed basins "in which the Department feels a comparison report should be considered by this Court." (Exhibit D, Order, p. 4). By letter to Judge Lessley dated August 18, 1987, DNRC stated that a comparison report should be considered by the Court for every previously-decreed basin (Exhibit F, letter from Gary Fritz, p. 4).

In short, DNRC, applying its expertise and best administrative judgment, has concluded that it should issue reports comparing the decreed basins verified and examined under the old rules with what the results would be had the new Rules been applied. This suggestion comports with fundamental fairness. Yet, the Water Court has interceded, purporting to have the authority to control the agency absolutely, and has directed that no such reports be prepared on previously-decreed

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<sup>3</sup> The various attached exhibits are taken directly from the U.S.'s "Exhibits to Brief in Support of Motion for Comparison Reports and Reverification," pending before the Water Court. For purposes of clarity, the present brief employs the same exhibit lettering system as used by the U.S., even though all of the U.S.'s exhibits are not attached hereto.

basins without Water Court approval.

The same thing is happening on basins in which no decrees have issued. The U.S.'s motion to the Water Court pointed out that DNRC, in a letter to the Chief Water Judge dated July 29, 1987 (Exhibit E), stated it believes that all basins or subbasins which were verified using the old procedures and in which no temporary preliminary or preliminary decree had issued should be reverified using the new claims examination rules. The Chief Water Judge's response was an Order, dated August 6, 1987 (Exhibit N), indicating that the Court would decide whether there was a need for re-examination, either partially or wholly, in such non-decreed basins. Again, this indicates that the administrative function of the DNRC is wholly compromised--that Department serves simply at the direction of the Water Court. In other words, in the best expert judgment of that agency, reverification should take place. Yet, the Water Court has handcuffed that agency from taking action based on its best judgment. This Committee is aware of the extreme pressure the Chief Water Judge has placed on the process to accomplish an expeditious adjudication of all water rights in Montana. While the goal is commendable, accuracy and fairness should not be sacrificed simply to obtain a hasty result.

The Water Court's Order to the DNRC of August 6, 1987, gave the DNRC permission to file, within 30 days of the date of that Order, a "Motion for Order to Re-Examine" any of the five undecreed basins in question (Order, p. 3). By letter to Judge

Lessley dated August 14, 1987, DNRC declined to submit such motion (Exhibit O, letter from Gary Fritz, p. 1).<sup>4</sup> On September 4, 1987 (Exhibit P), the DNRC submitted reports for the five basins which, as a practical matter, constituted "comparison reports" as contemplated by the Stipulation. According to the United State's brief, those reports reflect that over one-half of the new procedures are "significantly different" from the old procedures. U.S. Brief, p. 13. As the U.S. brief states:

Significantly, DNRC states that application of the new rules would uncover "issues" involving claimed water rights (presumably including instances of inaccurate and excessive claims) which to date have not been revealed under past verification procedures (Id. p. 3).

U.S. Brief, pp. 13-14. Yet, by Order filed October 19, 1987 (Exhibit R), the Water Court decided that "there is no apparent necessity sufficient to justify the costs of re-examining" Basin 40C (Lower Musselshell). Apparently there is no ruling yet from the Water Court on the other four undecreed basins.

These and other orders and directives show the high degree of control asserted by the Water Court over DNRC. For example, in a letter dated December 3, 1987, to G. Steven Brown, attorney for Fish, Wildlife and Parks, Chief Water Judge W. W. Lessley said regarding "Water Court participation in the verification process,"

The new examination rules are virtually silent on how

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<sup>4</sup> These facts are taken from the U.S.'s "Brief in Support of Motion for Comparison Reports and Reverification," filed before the Water Court on January 4, 1983. See pp. 12-14, particularly.

participation by the Water Court judges and water masters in the verification process will be handled and documented, because there will be virtually no such participation by the Water Courts. The Water Courts only direct the necessity and scope of the examination....

Exhibit A1, p. 2. This is a serious admission. The "necessity" and "scope" of examination of claims goes to the very heart of the verification process. Under the category "necessity," the Water Court completely controls whether the DNRC may undertake a verification. Under the category "scope," the Water Court completely controls how far the agency may go in the claims examination process. In short, the independence of the agency, with respect to the all-important task of verifying claims, is severely compromised.

Again, on August 19, 1987, in a letter to Gary Fritz, Administrator, Water Resources Division, DNRC, Chief Water Judge Lessley asserted:

As the Montana Supreme Court's July 7, 1987 Order, and this Court's August 6, 1987 Order hold, the decision as to whether any claims will be re-examined will be made by this Court, and not by your agency. The Water Court's authority regarding claim examination or re-examination is established by statute, and is not altered or controlled by the stipulation. See the Supreme Court's Order of July 7, 1987, p. 3.

Exhibit C, p. 2. This was in response to the DNRC's indication to the Water Court of its intent to proceed with the compilation of "comparison reports" as contemplated by the Stipulation. Again, it indicates the severe control exercised by the Water Court over agency judgment. This is also demonstrated by the Water Court's "Order" of August 7, 1987, in which the Water

Court cited this Court's Order Adopting Water Right Claim Examination Rules, Cause No. 86-397, p. 2 (July 7, 1987):

It is clearly the statutory intent, that as to past verified claims or those to be verified under the rules now promulgated, DNRC may consult with the Water Judge about such verification but the final determination is to be made by the Water Judge. The role of DNRC is consultatory only. The DNRC under (Section) 85-2-243, MCA, is "subject to the direction of the Water Judge" in all matters pertaining to the adjudication of existing water rights.

Exhibit D, p. 2 (emphasis the Water Court's). This clearly spells it out. The agency is under total control of the Water Court, based on language of this Court's Order of July 7, 1987, upon which the Water Court places heavy reliance. Presumably, in issuing that Order, this Court was relying on MCA § 85-2-243 (c) which provides that the DNRC "...subject to the direction of the Water Judge, shall:"

(c) conduct field investigations of claims that the Water Judge in consultation with the Department determines warrant investigation....

That statute, as interpreted by this Court's Order of July 7, 1987, clearly contravenes separation of powers principles. By this interpretation, the Department is rendered an arm of the court and can no longer exercise independent agency judgment. The fatal result is that improper water rights claims are slipping through the process without true "adjudication" -- there are numerous inaccurate and inflated claims that appear to be slipping through any review or adjudication process and finding their way into the Water Court's preliminary decrees. See generally U.S.'s Brief, pp. 7-14 and 20-27. This is because

the Water Court's adjudication process, as designed, cannot work effectively without aggressive and independent participation by the Montana DNRC. The Water Court relies on neighbors to object to other neighbor's inflated claims. As the process is unfolding, however, this hope is not materializing--partly because of the reluctance of some neighbors to dispute with other neighbors, and partly because private water users do not have the resources to do the kind of technical studies necessary to verify and field examine water claims.

The Water Court is so interested in expediting and controlling the process that it is sacrificing accuracy for speed.

The impact to Tribal water rights is obvious. As the Committee is aware, the Tribes are involved in attempting to negotiate a water compact with the Montana Reserved Water Rights Compact Commission. Should a compact not be reached, the Tribes will apparently be faced, at a later date, with injecting themselves into the process after the temporary preliminary decrees have been established--decrees which by their very nature are going to incorporate inaccurate and inflated claims. By that time, it will probably be too late to conduct meaningful verification and to challenge such claims. Moreover, the State and the competing water users will, by that time, have resolved their differences, and may well present a united front against the Tribal interests.

B. The Control Exerted by the Water Court Over DNRC Violates Separation of Powers Principles and Due

### Process of Law.

The Constitution of this State since its inception, has always divided the powers of government into three separate branches--the legislative, executive and judicial--and specifically prohibited the exercise of power properly belonging to one branch by any of the others. See Art. III, Sec. 1, Mont. Const. (1972); Art. IV, Sec. 1, Mont. Const. (1889). Art. III, Sec. 1, Mont. Const. (1972) currently provides as follows:

Separation of powers. The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Further, the Constitution of this State provides for limited checks and balances. See, e.g., Art. V, Sec. 13 (impeachment); Art. VI, Sec. 10 (veto power by the governor); Art. VII, Sec. 2 (3) (rule making power of supreme court). The Constitution of this State thus embodies the concept of the separation of powers and checks and balances to protect any one branch against the overreaching of any other branch and thereby articulates the basic philosophy of our constitutional system of government. See, The Federalist, Nos. 47, 78 (1788).

In Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909), the Montana Supreme Court aptly described the functions served by the concepts of separation of powers and checks and balances:

It is within the knowledge of every intelligent man

that [the purpose of the separation of powers] is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgement of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally a violation of the people's confidence. Indeed, the distinction goes so far as to require each department to refrain from in any way impeding the exercise of the proper functions belonging to either of the other departments.

39 Mont. at 168-169 (emphasis supplied).

The exercise of control by the Water Court over the actions of DNRC, an executive agency, are actions "impeding the exercise of the proper functions belonging to (the executive department)" within the meaning of Schneider v. Cunningham.

The United States Supreme Court, in the federal system, has been equally as diligent in protecting the separation of powers of the various departments of the government. The Court was particularly sensitive about executive power in Springer v. Philippine Islands, 277 U.S. 189 (1928), a case in which it struck down enactments that it concluded vested too much executive power in corporate creatures of the legislative branch. The Court reasoned:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions...

...[T]he Legislature cannot engraft executive duties



upon a legislative office...

\* \* \*

...[The individuals in question] are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the legislature.

277 U.S. 189, 202-03. And, in Buckley v. Valeo, 424 U.S. 1 (1976), the U.S. Supreme Court said:

This court has not hesitated to enforce the principle of separation of powers embodied in the constitution when its application has proved necessary for the decisions of cases or controversies properly before it. The court has held that executive or administrative duties of a non-judicial nature may not be imposed on judges holding office under Article III of the Constitution. United States v. Ferreira, 13 How. 40, 14 L.Ed. 42 (1852); Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792).

Id. at 123 (emphasis added). Here, MCA § 85-2-243 clearly does that--it imposes executive or administrative duties of a non-judicial nature on the Water Court. (Although "imposes" may be too harsh a word in the present context, since the Water Court has willingly accepted such expansion of powers. Nevertheless a breach of separation of powers is clear, the legitimate executive/administrative authority is arrogated by the judicial branch).

Recently, the United States Supreme Court has addressed the powers of the judicial branch in Young v. United States ex rel. Vuitton, \_\_\_ U.S. \_\_\_, 95 L.Ed.2d 740, 107 S.Ct. 2124, 55 U.S.L.W. 4676 (1987). In that case, the court held that the judicial branch had the inherent power to appoint a special counsel to represent the government in the investigation and

prosecution of a criminal contempt action (i.e., enforcement of the court decree), but held that such special counsel should be as disinterested as a public prosecutor. Hence, it held it was improper to appoint, as the special counsel, the attorney for the party who is beneficiary of the court order. In his concurring opinion, Justice Scalia carefully addressed the nature of the judicial power as follows:

...the only power the constitution permits to be vested in federal courts is "[t]he judicial power of the United States." Art. III, § 1. That is accordingly the only kind of power that federal judges may exercise by virtue of Art. III commissions. Muskrat v. United States, 219 U.S. 346, 354-356 (1911); United States v. Ferreira, 13 How. 40 (1852). The judicial power is the power to decide in accordance with law, who should prevail in a case or controversy. See Art. III, § 2. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them--which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. See United States v. Cox, 342 F.2d 167 (CA 5) (en banc), cert. denied, 381 U.S. 935 (1965), and authorities cited therein; 342 F.2d at 182 (Brown, J., concurring); Id., at 185 (Wisdom, Jr., concurring); see generally United States v. Thompson, 251 U.S. 407, 413-417 (1920). Rather, since the prosecution of law violators is part of the implementation of the laws, it is--at least to the extent that it is publicly exercised--executive power, vested by the Constitution and the President. Art. II, § 2, cl. 1. See Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976).

Id. at 4685. While the majority opinion disagreed to the extent that it found an inherent court power to appoint a special prosecutor to bring contempt of court proceedings, the court did not disagree in general with Justice Scalia's interpretation of the separation of powers principles. Certainly the powers that

the Water Court seeks to exert (control over necessity and scope of verification in claims examination of water claims) is well beyond any colorable claim of inherent judicial power.

Recently in Bowsher v. Synar, 478 U.S. 714, 54 U.S.L.W. 5064 (1986) the U.S. Supreme Court invalidated provisions of the Gramm-Rudman-Hollings Act because Section 251 of the Act improperly assigned executive powers to the comptroller general (i.e., the ultimate authority in determining what budget cuts are to be made). The court held that by placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by Congress, the Congress in effect retained control over the Act's execution and thus, unconstitutionally intruded into the executive function. The court said:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, Chadha (v. INS, 462 U.S. 951) makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Buckley v. Valeo.... Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objections, must be resisted." Chadha, 462 U.S. at 951.

Id. at 5068.

The same is true regarding judicial usurpation of executive function. The Water Court's powers, as applied, essentially give that Court the power to veto execution of the law. Here, as in Buckley v. Valeo, the "hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power" must be resisted even if it is "to accomplish desirable objectives."

Most recently, in Morrison v. Olson, \_\_\_\_ U.S. \_\_\_\_, 56 U.S.L.W. 4835 (June 29, 1988), the U.S. Supreme Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 in the face of the separation of powers challenge. In doing so, the Court reaffirmed the importance of the separation of governmental powers into three coordinate branches. It held, however, that the power of the "Special Division" (a special court created by the Act) to appoint a special prosecutor to investigate improprieties in the Justice Department did not offend separation of powers. It so held because the power to appoint inferior officers, such as independent counsels, "is not in itself an 'executive' function in the constitutional sense...." More important however was the fact that,

...the various powers delegated by the statute to the Division are not supervisory<sup>5</sup> or administrative, nor are they functions that the Constitution requires to be performed by officials within the Executive Branch.

---

<sup>5</sup> The Court observed at 4842: "The Act simply does not give the Division the power to "'supervise' the independent counsel in the exercise of her investigative or prosecutorial authority."

Id. at 4846. Contrary to the situation in Morrison, the Water Court exercises supervisory authority over the DNRC in the extreme. As the documentation referred to above demonstrates, the DNRC cannot even undertake many important verification activities without the permission of the Water Court.

In sum, the Montana water adjudication process is faulty for a number of reasons. It goes well beyond traditional "judicial powers" and invades the arena of executive-administrative powers, by placing a high degree of control over DNRC in the Water Court. For these reasons, the Tribes urge a serious revision of the procedures so that the Water Court's role in claims examination and verification is narrowly limited, consistent with the Montana Constitution. Moreover, separate rules should be adopted by DNRC, consistent with the independent administrative role that agency should play, to ensure that there is adequate administrative verification in claims examination.

## II.

### ACCURACY OF DECREES

While speed and efficiency are important in the Water Court adjudication process, the overriding goal must be accuracy. The Tribes agree with the draft report that there cannot be 100 percent accuracy. However, the current Montana adjudication process falls well short of that goal. Perhaps the most telling reflection of that problem is in the Ross Survey of Montana Right Practitioners appended to the draft report. See pp. II-3

through II-6. The results to question No. 9 are as follows:

9. In your experience, to what extent do the decrees which have been entered by the Water Courts constitute accurate adjudications of pre-July 1, 1973 water rights?
- |           |   |
|-----------|---|
| <u>2</u>  | To a great extent (with more than 90% certainty)    |
| <u>1</u>  | To a moderate extent (with more than 7% certainty)  |
| <u>5</u>  | To an average extent (with more than 50% certainty) |
| <u>13</u> | To a poor extent (with less than 50% certainty)     |
| <u>2</u>  | Don't know  |

It is clear that the majority of water rights practitioners think that the decrees to date provide accurate adjudications "to a poor extent." Even more telling is the fact that only two practitioners think there is accuracy "to a great extent" and only one "to a moderate extent." How can there be confidence in a system of water rights adjudication when those persons who deal with the system most intimately, the water rights practitioners, have reached these conclusions?

The conclusory references to the Wright Engineering Study do little to allay fears as to accuracy. First, the Tribes understand that there were serious time and financial limitations placed on the Wright Engineers' studies. Second, it is not clear from the report that Wright Engineers did any field verification at all. The extensive criticism made of the process to date focuses on the inadequacy of the verification processes and the severely limited field investigations undertaken by the DNRC. It is difficult to see how Wright Engineers, with the apparent limitations that were placed on them, could reach a conclusion about the accuracy of the decrees

in which anyone could have confidence. Because the draft report lacks detail about the Wright Engineering Report and its methodology, however, the Tribes are unable to comment further until they have access to the report. By separate letter, they are requesting a copy of that report.

The crux of the problem is that there are serious inaccuracies in the Water Court decrees, due in large part to the flawed procedures above discussed. The draft report is disappointing in its failure to address meaningfully these concerns.

RESPECTFULLY SUBMITTED this 19th day of August, 1988.

Daniel F. Decker  
Tribal Legal Department  
CONFEDERATED SALISH & KOOTENAI  
TRIBES OF THE FLATHEAD  
RESERVATION, MONTANA  
P.O. Box 278  
Pablo, MT 59855

Phone: (406) 675-2700

James H. Goetz  
GOETZ, MADDEN & DUNN, P.C.  
Attorneys at Law  
35 North Grand  
Bozeman, MT 59715

Phone: (406) 587-0618



# MONTANA WATER COURTS

## STATE OF MONTANA

RECEIVED  
DEC - 7 1987

DEPT. JUSTICE LANDS DIVISION  
SUNDAE, MONT.

December 3, 1987

### WATER JUDGES:

Upper Missouri River Basin  
Chief Judge W. W. Lesley  
PO Box 679  
Bozeman, MT 58718

Lower Missouri River Basin  
Judge Bernard W. Thomas  
PO Box 838  
Chinook, MT 59523

Clart Fork River Basin  
Judge Robert M. Matter  
Lincoln County Courthouse  
Libby, MT 59823

Yellowstone River Basin  
Judge Roy C. Rodeghiero  
PO Box 448  
Roundup, MT 59072

G. Steven Brown  
Attorney at Law  
Mt. Dept. of Fish, Wildlife and Parks  
1420 E. 6th Ave.  
Helena, MT 59620

Dear Mr. Brown:

I have received your November 17, 1987 letter which discusses implementation of the 1986 Stipulation and which requests a meeting of the Water Court advisory council.

The Stipulation has never been accepted by the Montana Supreme Court. Paragraph 46 states:

46. If this Stipulation is accepted by the Montana Supreme Court, the parties agree the Department, Esther McDonald, et al., and the United States of America will dismiss all or portions of their petitions as follows:

- A. The Department will dismiss its July 17, 1985, Petition for Writ of Supervisory Control, or in the Alternative, Exercise of Administrative Supervision under Article VII, Section 2, of the Montana Constitution and Section 3-7-304, MCA;
- B. The petitioners in McDonald, et al., will dismiss Counts Two through Four of the September 20, 1985, Complaint for Declaratory Judgment;
- C. The United States of America will dismiss its October 4, 1985, Petition for Writ of Supervisory Control;
- D. The dismissals described in this paragraph shall be without prejudice; and
- E. The dismissals described in this paragraph shall not be construed as an admission that the allegations made in Cause Nos. 85-345, 85-468, and 85-493 are untrue or without merit.

Exhibit A-1



(emphasis added). Because the Stipulation has not been accepted, I believe it is not binding on the parties. And because it has not been accepted, it would appear to me that the Petitions have not been dismissed.

I have said that I don't believe the Stipulation is binding. But I do believe that some of its provisions are good. The Water Court has proceeded to institute some of these provisions even though the Stipulation has not been accepted. Orders have been issued, Water Court Rules amended and new ones made, forms and notices modified, abstract format has been changed, and the new examination rules have been prepared by the DNRC and Water Court and have been provisionally accepted by the Supreme Court and are currently open to public review and comment.

Following is a response to the two sections in your letter.

RE: INADEQUATE NOTICE TO THE PUBLIC AND STIPULATION  
SIGNATORIES

You state that there was faulty implementation of the provisions of Paragraphs 30 and 31. The Water Court Order for comparison reports and re-examination orders were not issued under the Stipulation. As stated before, while the Stipulation has not been accepted and is not binding, we felt the suggested drafting of comparison reports was a good idea. We proceeded to order and review those reports on our own authority. Like all Water Court documents, the comparison reports are available for public review. Any person, which includes the Department of Fish, Wildlife and Parks, named in the decree for a particular basin may file a Motion to re-examine if they feel it is necessary. For any basin that is re-examined, additional notice will be given when the decree is made available.

RE: WATER COURT PARTICIPATION IN THE VERIFICATION  
PROCESS

The new examination rules are virtually silent on how participation by the Water Court Judges and Water Masters in the verification process will be handled and documented, because there will be virtually no such participation by the Water Courts. The Water Courts only direct the necessity and scope of the examination. This direction has been implemented through the new examination rules. If any pre-decree issuance involvement by the Water Courts is necessitated by the odd-ball situation, such involvement will be documented in the claim file as it has in the past. If you feel this is insufficient, comments to the Supreme Court concerning the new examination rules would appear to be the proper action.

You detailed a situation involving possible overreaching or ex parte discussions concerning the examination of a claim after decree issuance. The judges and masters of this court know about

judicial ethics. That is why they, on their own, disqualify themselves from hearing or continuing with particular cases. That is why the master who assisted in the verification under the previous verification procedures is never assigned to hear any of the objections in that basin. As you know, disqualification procedures are set forth in Title 3, Chapter 7, Part 4, MCA.

You specifically mention Case 43B-716. A review of that October 1, 1987 status conference transcript and the December 1, 1987 Exhibit of Amendatory claims and Statement on other claims filed by Richard Kalar indicate that my statements were to the effect that late claims can be filed and if they are later determined to be valid, then we would proceed to include the claims in the decree. I do not think that sort of general statement concerning process or procedures constitutes inappropriate communication between a claimant and the Water Court.

You question the propriety of sending copies of letters and orders to the Supreme Court, our supervising court. You also assert that this Court and the Supreme Court are engaging in inappropriate communications. If you question the integrity and ethics of this Court and the Supreme Court, then you should voice those concerns to the Supreme Court.

While there are some fine provisions, in my view there has been such a significant change in circumstances since the Stipulation was signed, that if the Stipulation were now accepted by the Supreme Court, strict enforcement of that document would no longer be possible or advisable.

Since the Stipulation was signed in February, 1986, this Court has been joined in litigation before the Montana Supreme Court by your client, the Board of Natural Resources and Conservation, as well as the DNRC. This litigation has produced the Supreme Court's opinion in the case In Re The Activities of the DNRC et al., MT, 44 St. Rep. 604 (1987), as well as the Order and Water Right Claim Examination Rules issued on July 7, 1987.

The Opinion, Order and Rules serve to clarify the relative authority and responsibilities of the Water Court and DNRC, and provide rules for claim examination. Clearly, the Stipulation cannot influence or restrict the Court's authority to construe and decide issues of law.

Since the Stipulation was signed, the DNRC has supported and experienced drastic reductions to its budget relating to adjudication services. These reductions have decreased DNRC field office services by approximately two-thirds. These reductions have rendered the Water Court's authority to establish time frames under paragraph 26 of the Stipulation almost meaningless. Further, these reductions may also contravene paragraph 44 of the Stipulation wherein all parties agreed that the provisions of the Stipulation may require increased DNRC and Water Court funding, and the Montana parties agreed to support

reasonable DNRC and Water Court funding requests. Instead, certain parties sought and supported decreased DNRC funding. The DNRC has also withdrawn many of the objections it had filed. This policy appears contrary to the implications of Paragraph 29 and to 85-2-233 MCA. These points are only brought to your attention to show that it appears that the DNRC has not felt bound by the Stipulation.

In consideration of these significant changes, it is apparent that strict enforcement of the Stipulation is no longer equitable, or in some cases, possible. Under paragraph 47 of the Stipulation, it was agreed that no signatory waived the right to take appropriate legal action to enforce the terms of the Stipulation. This is apparently the "formal litigation" to which you refer in paragraph 1 of your letter.

The Supreme Court has clearly addressed the legal considerations of DNRC examination of claims. Further negotiation on these issues is not possible or necessary. Any concerns you have can always be raised by Motion and full consideration will be given in the Water Court. Comments on the new examination rules should be filed with the Supreme Court.

The Stipulation must no longer be used to delay ongoing adjudication efforts. Further, I decline your request to convene the Water Court Advisory Council at this time.

Best personal wishes,

ORIGINAL SIGNED BY  
*W. W. Lessley*  
W. W. Lessley  
Chief Water Judge

WWL/jl

Conrad B. Fredricks  
Richard W. Josephson  
John R. Hill, Jr.  
Michael E. Zimmerman  
Perry J. Moore  
Karl J. Englund  
John P. Scully  
John R. Christensen  
Blair Strong  
Mike Greely  
Clay R. Smith  
Tim D. Hall

Exhibit A-1

RECEIVED

AUG 20 1987

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION



MONTANA WATER COURTS

STATE OF MONTANA

August 19, 1987

AUG 25 1987

WATER JUDGES:

Upper Missouri River Basin  
Chief Judge W. W. Lessey  
PO Box 879  
Butte, MT 59716

Lower Missouri River Basin  
Judge Bernard W. Thomas  
PO Box 938  
Chinook, MT 59623

Clark Fork River Basin  
Judge Robert M. Miller  
Lincoln County Courthouse  
Libby, MT 59623

Yellowstone River Basin  
Judge Roy C. Rodeghiero  
PO Box 448  
Roundup, MT 59072

Mr. Gary Fritz  
Administrator, Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620

DEPT. JUSTICE LANDS DIVISION  
DENVER, COLO.

RE: Order - Resuming Issuance of Basin Decrees and  
Allowing Motions for Re-Examination, August 6,  
1987.

Dear Gary,

I have received your letter of August 14, 1987,  
concerning the Order referenced above.

I appreciate your agency's intent to comply  
diligently with this Order. However, I must point out  
that this Order did not request nor authorize the  
making of "comparison reports" in any of the five  
basins set forth in the Order.

As you know, the August 6, 1987 Order addressed  
five basins which have already been fully examined  
under the "verification manual" procedures. The  
purpose of that Order was to help this Court determine  
the necessity of any claim re-examination, before  
issuing decrees for these five basins.

By your letter to me dated July 29, 1987, I was  
informed that your agency was planning to re-examine  
these basins using the Water Right Claim Examination  
Rules adopted by the Montana Supreme Court on July 7,  
1987. I quote from that letter:

"...our department expects to apply the recently  
promulgated Supreme Court claim examination  
rules to the White Water Basin as well as other  
non-decreed basins that have been partially or  
totally verified using the Water Court  
verification manual." (emphasis supplied).

Further, your letter stated:

Exhibit C

"It is the Department's position that the claims examination rules recently adopted by the Supreme Court govern all examination practices and procedures after July 15, 1987. The July 7, 1987 Supreme Court order said: The effective date of these rules is July 15, 1987. The adoption of these rules shall be deemed temporary until the further order of this Court, but shall govern from that date the practice and procedure respecting water claims examinations before the Water Court and the DNRC, unless otherwise or amended or modified by this Court. Therefore, the DNRC believes that all non-decreed basins or sub-basins should be re-verified using the new rules." (Emphasis supplied).

As the Montana Supreme Court's July 7, 1987 Order, and this Court's August 6, 1987 Order hold, the decision as to whether any claims will be re-examined will be made by this Court, and not by your agency. The Water Court's authority regarding claim examination or re-examination is established by statute, and is not altered or controlled by the Stipulation. See the Supreme Court's Order of July 7, 1987, page 3.

The effect of the Supreme Court's July 7, 1987 Order is clear. Any claim examined after July 15, 1987, will be reviewed under the Water Right Claim Examination Rules adopted by the Supreme Court. But that does not require claims which have already been fully examined under the "verification manual" procedures, to be re-examined. That decision rests with this Court.

It is this Court's view that the examination process conducted by your department in the five basins was professional and comprehensive. All of the time, effort and money already expended by your agency to examine these claims should not be disregarded lightly. These concerns become even more pressing in light of your recent reductions in adjudication personnel and services. Re-examination should be allowed only where a clear necessity for such action is shown, especially where these basins have already been fully examined under the "verification manual" procedures.

After careful review of the Water Right Claim Examination Rules, it does not appear that the procedures contained therein are substantially different from the "verification manual" procedures. Therefore, the reasons for your agency's stated belief that all non-decreed basins should be "re-verified", remain unclear.

This Court's August 6, 1987 Order provided your agency a clear and full opportunity to inform this Court of the reasons why re-examination is necessary. Why your agency has declined to submit the "Motion for Re-Examination" remains unexplained. This Court recognizes that any Claimant who so desires may, themselves, submit a "Motion for Re-Examination". However, the

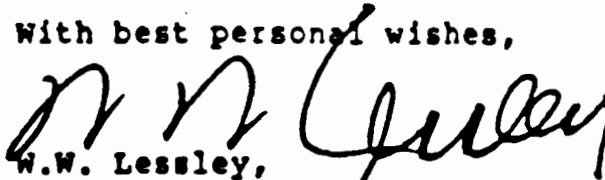
August 6, 1987 Order sought out your views because of the expertise and experience possessed by your agency.

Before this Court makes a final decision regarding the re-examination of Basins 40K, 43A, 40C, 41G or 41C, it wishes to further consider the differences between the "verification manual" procedures used in these basins, and the procedures in the Water Right Claim Examination Rules. Also relevant to the decision to re-examine is an idea of how long the re-examination would take, and how this would impact the continuing examination of new claims.

Because this Court recognizes the value of your agency's special expertise in these areas, I have issued the enclosed Order. The information supplied by your agency pursuant to this Order will assist this Court in determining the need to re-examine the five basins. Accordingly there is no need, at this time, to prepare or submit the comparison reports discussed in your August 14, 1987 letter.

I remain willing and available to discuss these issues with you either by telephone or in person.

With best personal wishes,

  
W.W. Lessley,  
Chief Water Judge

WWL/cm  
encls.

cc: Honorable Justice John Sheehy

IN THE WATER COURTS OF THE STATE OF MONTANA

\*\*\*\*\*

IN RE: RE-EXAMINATION OF BASINS ALREADY SUBJECT TO  
TEMPORARY PRELIMINARY OR PRELIMINARY DECREES

\*\*\*\*\*

O R D E R

By a letter to this Court, (attached to this Order, with its pertinent portion underlined, and by this reference made a part of this Order) the Department of Natural Resources & Conservation (Department) has raised several issues concerning the re-examination of claims in all basins currently issued as temporary preliminary or preliminary decrees.

The Department has notified this Court that it is preparing reports which compare the original claim examination procedures with those recently adopted by the Montana Supreme Court. The Department's position is that it is required and authorized to make these reports under the terms of the Stipulation presented to the Montana Supreme Court in February, 1986.

The Montana Supreme Court has made it clear that the ultimate decision as to whether any claims are to be re-examined by the Department, is to be made by the Water Court, and not by the Department.

"It has been suggested to us by counsel for the Washington Water Power Company and for the Montana Power Company, that the verification process that has been used heretofore is inadequate to insure

accuracy in the water rights decrees and fairness to all claimants. These parties suggest that the new verification rules should be applied equally to all water rights claims, including those water rights claims which have been the subject of temporary preliminary decrees heretofore entered by the water courts.

As we have interpreted (Section) 85-2-243, MCA, and do now interpret it, the DNRC is required to 'conduct field investigation of claims that the water judge in consultation with the Department determines warrant investigation;....' It is clearly the statutory intent, that as to past verified claims or those to be verified under the rules now promulgated, DNRC may consult with the water judge about such verification but the final determination is to be made by the water judge. The role of DNRC is consultatory only. The DNRC, under (Section) 85-2-243, MCA, is 'subject to the direction of the water judge' in all matters pertaining to the adjudication of existing water rights."

Order Adopting Water Right Claim Examination Rules, Cause No. 86-397, page 2, (July 7, 1987)  
(Emphasis supplied).

In this same Order, the Supreme Court takes note of the provisions of House Bill 754 and the severely reduced operating budget for the Department examination services. The Supreme Court goes on to state:

"The 1987 legislature left intact the provisions that DNRC acts subject to the direction of the water judges under Section 85-2-243, MCA. The statutory power of the water judges to direct the process of adjudication should not and cannot be stipulated away. In view of the limited finances, it behooves the water judges to assume the reins in claims examinations procedures subject to the priorities of the legislature, to use the limited funds wisely for the advancement of the adjudication process".

Order Adopting Water Right Claim Examination Rules, Cause No. 86-397, page 3, (July 7, 1987)  
(Emphasis supplied).



This Supreme Court Order clearly holds that regardless of the Department's assumed authority under the Stipulation, the ultimate decision-making authority relating to the examination or re-examination of claims under Section 85-2-243, MCA, resides with this Court, and is not altered by the Stipulation.

It must be recognized that the 1986 Stipulation, presented over one and one-half years ago, has never been formally accepted by the Montana Supreme Court. Even if the Stipulation did control the areas of claim examination and re-examination, there is absolutely no provision in the Stipulation which authorizes the Department to undertake the action which it now seeks to perform.

Paragraph 30 of the Stipulation states:

"Within a reasonable time after execution of this Stipulation and the adoption of verification procedures as set out in this stipulation, DNRC, in those basins where temporary preliminary decrees or preliminary decrees have been issued, shall file a report with the Water Court comparing the previous verification procedures with the verification procedures adopted pursuant to this stipulation. The Water Court on its own Motion, on the request of DNRC, or on the request of any person may order DNRC to apply the procedures adopted pursuant to this Stipulation to any of those basins."  
(Emphasis added).

This paragraph clearly authorized only limited comparison of the old verification procedures with those procedures adopted pursuant to the Stipulation. Since the new procedures set out in the Supreme Court's Water Right Claim Examination Rules are not adopted pursuant to the Stipulation,

paragraph 30 does not now authorize the DNRC to compare the old verification procedures with those recently adopted by the Supreme Court.

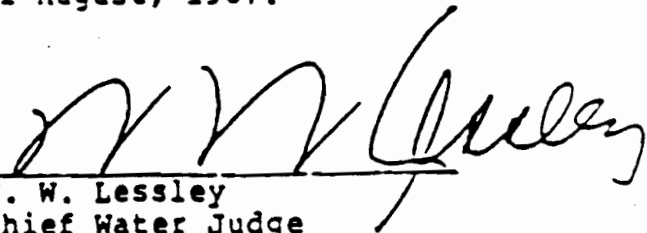
So that the limited Department examination and field office resources may be utilized in the wisest and most economical fashion, and to help this Court assess the necessity for re-examination of already issued basins, it is HEREBY,

ORDERED, that the Department and its field office staffs shall not undertake any further action to prepare or submit any comparison reports in any decreed basin, without the clear approval and authorization of the Water Court.

FURTHER ORDERED, that the Department shall, within 30 days from the date of this Order, file with this Court a detailed list of every already decreed basin in which the Department feels a comparison report should be considered by this Court.

FURTHER ORDERED, that for every basin set forth on this list, the Department shall include a good-faith estimate of the time required to prepare the "comparison report" as well as an estimate of the time which would be required to re-examine the particular basin.

DATED this 7 day of August, 1987.

  
W. W. Lessley  
Chief Water Judge

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

1220 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620-2301

July 29, 1987



Honorable Judge W.W. Lessley  
PO Box 876  
601 Haggarty Lane  
Bozeman, MT 59715

Dear Judge Lessley:

In response to your July 20, 1987 letter to Bob Arrington inquiring about the Whitewater Basin (40K) claims status, our department expects to apply the recently promulgated Supreme Court claim examination rules to the Whitewater Basin as well as other non-decreed basins that have been partially or totally verified using the former water court verification manual. As stated in Bob Arrington's March 19, 1987 correspondence to you, only initial verification using the outdated verification manual has been completed in that basin.

It is the Department's position that the claims examination rules recently adopted by the Supreme Court govern all examination practices and procedures after July 15, 1987. The July 7, 1987 Supreme Court order said:

The effective date of these rules is July 15, 1987. The adoption of these rules shall be deemed temporary until the further order of this Court, but shall govern from that date the practice and procedure respecting water claims examinations before the Water Court and the DNRC, unless otherwise or amended or modified by this Court.

Therefore, the DNRC believes that all non-decreed basins or sub-basins should be re-verified using the new rules. Since only the initial verification has been completed for the Whitewater Basin (40K) and other essential verification exercises have not been completed, the DNRC expects to apply the new Supreme Court claim examination rules in their entirety for the basin.

In accordance with the Stipulation, please be advised that the DNRC plans to complete the reports for decreed basins comparing the previous verification and Supreme Court examination procedures before scheduling claim examination for non-decreed basins. The Department further believes that the Stipulation

Honorable Judge W.W. Lessley

Page 2

July 29, 1987

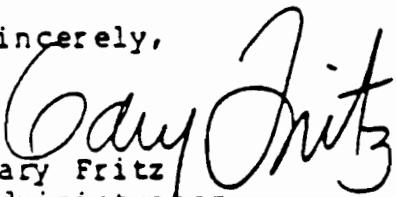
requires that any subsequent claim re-examination in decreed basins be conducted prior to claim examination in non-decreed basins. The Department will begin submitting these comparison reports within the next few weeks. The Willow Creek Basin (41N) claim examination comparison will be the first report scheduled for completion.

As Larry Holman explained in his June 16, 1987 confirmation letter to you, we plan to complete a proposed schedule of all non-decreed basins or sub-basins to be examined using the new rules after the comparison reports are submitted. As mandated in the Statement of Intent for HB 754, claim examination for Whitewater Creek should be scheduled after the Lower Milk River (400) and Beaver Creek (40M). The DNRC realizes that Turtle Mountain reserved water rights may be present within the Whitewater Basin. Therefore, as with other basins containing possible Indian reserved water rights, a sub-basin may need to be designated to partition the Indian reserved water rights from the non-reserved portion.

In summary, the Department believes that the comparison reports for decreed basins as required by the Stipulation must be submitted, and any subsequent re-examination conducted prior to claims examination in non-decreed basins. The Whitewater Creek Basin claims as well as other non-decreed basins would then be examined using the new Supreme Court claim examination rules. The new claim examination for Whitewater Creek claims would not be expected to require as much staff time as under the old process since some examination exercises will not need to be repeated.

If you have questions, please call me.

Sincerely,

  
Gary Fritz  
Administrator  
Water Resources Division

cc: Honorable Jean A. Turnage

GF:rmc

Exhibit E

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620-2301

August 18, 1987

Chief Judge W.W. Lessley  
Montana Water Courts  
P.O. Box 879  
Bozeman, MT 59715

Dear Judge Lessley:

I am writing to you in response to your Order of August 7, 1987, concerning the re-examination of claims in basins currently issued as temporary preliminary or preliminary decrees.

Initially, you have ordered that the Department not undertake any further action to prepare or submit any comparison reports in any decreed basin without the clear approval and authorization of the Water Court. All Department action to prepare or submit comparison reports in decreed basins has ceased. However, as you are aware, a comparison report does not involve any re-examination of claims but is an agency report developed to aid the Department in its consultations with the water judges as to the need to re-examine claims under the rules adopted by the Montana Supreme Court.

In its March 31, 1987 opinion, the Supreme Court stated:

As with DNRC's due process claims, we do not have a factual record that would establish an improper exercise by the water courts of executive powers in the guise of judicial action. We do have, however, the stipulation entered into between the DNRC, the water courts and other parties in cause nos. 85-345, 85-468, and 85-493 pending in this Court. In that stipulation, in paragraph 26, page 10, it is stated:

Pursuant to section 85-2-243, MCA, the water court, after consultation with DNRC, shall issue orders establishing time frames for the completion of verification by DNRC and the submission of verification information to the court. The water court order shall also establish the specific elements of each type

Honorable Judge W.W. Lessley  
Page 2  
August 18, 1987

of water right claimed to be verified by DNRC. The verification by DNRC shall be limited to factual analysis and the identification of issues. The water court shall refrain from participating in the verification of claims by DNRC, except the water court, upon proper application and for good cause shown, may enjoin DNRC from acting beyond its jurisdiction in the verification process.

The language of the foregoing stipulation, acceded to by the chief judge of the water court, belies any intention of the water court to override or control the day to day operations of the DNRC. The only effect of the orders of July 23 and August 8, 1986, issued by the water court was to require the DNRC to desist from making rules under MAPA, a procedure which we have already shown to be beyond the power of the DNRC in this case.

Again in the absence of a factual record, we find no intrusion by the water courts in this case upon the executive duties of the DNRC.

The Stipulation contemplated adoption of new verification procedures through the appropriate mechanism. No mechanism was adopted in the Stipulation. The Supreme Court has now ruled that it is the appropriate rulemaking entity. As such, paragraph 30 clearly authorizes the Department to compare the old verification procedures with those adopted by the Supreme Court. Even if the Stipulation had not provided for this, the assertions that equal protection has been violated by significantly different verification methods from basin to basin would mandate these comparison reports.

It may be helpful if I explain my understanding of the integration of the Stipulation with the Supreme Court action on the verification rules. Apparently, the separation of powers envisaged by the Montana Supreme Court is that established in the Stipulation; that is, the Water Court sets the parameters of claims examination and the Department performs the technical work of examining each claim.

The Department certainly agrees that the "statutory power of the water judges to direct the process of adjudication should not and cannot be stipulated away" (Supreme Court Order "Adopting Water Right Claim Examination Rules," Page 3). Stipulations cannot strip away the statutory authority or duty of the Court

Honorable Judge W.W. Lessley  
Page 3  
August 18, 1987

or any agency. The 1986 Stipulation, signed by the Department, the Water Court, and others does not attempt to nor can it remove statutory authority from any of the signators.

Since the signing of the February 1986 Stipulation by the Water Court, the Department has assumed that the Stipulation provided Water Court guidance for the Department regarding our water right adjudication activities, including the preparation of "comparison reports." I am not aware of any action of the Water Court or the Supreme Court to change the effect of that Stipulation. In fact, the Supreme Court order of March 31, 1987, recognizes the Stipulation. The Water Court Order of August 7, 1987, is the first indication, of which I am aware, that the Water Court believes the Stipulation signed by the Water Court to be invalid.

Apparently, the Water Court is attempting to distinguish between verification procedures adopted pursuant to this Stipulation and the Supreme Court claim examination rules in an attempt to void the stipulated mandate for "comparison reports." Clearly, the intent of the Stipulation was to have new claim examination procedures adopted. The precise format of how these new procedures were to be adopted was not identified.

After the Stipulation was signed, the Department diligently proceeded to write new claims examination rules. When the new claim examination rules were drafted, the Department made it clear that it expected to adopt the rules pursuant to MAPA. Conversely, you expressed your desire that the MAPA process not be used. This conflict led to the Supreme Court adoption of those rules. Clearly, the new claim examination rules were the result of the Stipulation.

Further, the Stipulation required the Department to prepare reports that compare the previous verification rules with the new verification procedures. The Stipulation also stated that pending implementation of the procedural revisions described in the Stipulation, the Water Court would not issue any preliminary or temporary preliminary decrees. Consequently, since the adoption of the Supreme Court water right claim examination rules on July 7, 1987, the Department has placed the highest priority on completing these "comparison reports." The Department has clearly stated to the Water Court our intention to comply with the Stipulation in that regard on several occasions.

Quite frankly, given the well-documented history of the Stipulation and claim examination rule development, I am surprised that the Water Court now feels that a different

Honorable Judge W.W. Lessley  
Page 4  
August 18, 1987

approach is to be followed. Certainly, blind adherence to the Stipulation is unwise if better procedures are available. However, if the Stipulation is to be abandoned by the Water Court, then all parties to the Stipulation should be notified.

The Department is also concerned that your Order of August 7, 1987, creates a factual basis upon which to base due process and separation of powers issues. Although this agency does not intend to appeal the Order, it must be recognized that the Order is a public record. Once the agency acts in compliance with the Order, there is created an irreversible exercise of the control of the day-to-day operations of the Department by the Water Court. The Department respectfully requests that the Court reconsider its action and vacate its August 7, 1987 Order.

The Department agrees with the Montana Supreme Court that our technical expertise is indispensable for the success of the adjudication process. The Department fully intends to cooperate with the Water Court in furnishing our expertise. The agency is most happy to provide you with a response to any informational request without the need for a court order. As I mentioned previously, such Orders controlling the daily activities of this agency only serve to create a factual record for attacking the validity of the adjudication process. On the other hand, a request for information does not contain the same controlling connotation as an order and therefore does not jeopardize the adjudication program, and attains the same result--a timely, direct and full response to your informational request.

Whether you decide it is more responsible to vacate your Order in this matter, the Department, by this letter, hereby furnishes to the Court the subject information:

- 1) A detailed list of every already decreed basin in which the Department feels a comparison report should be considered by the Court.

Since there is no way for anyone to determine whether re-examination of a basin should occur until a comparison of the old examination procedures and the new examination procedures occurs, the Department feels that a comparison report should be made for all of the basins currently in temporary preliminary and preliminary decree (see attached table).

- 2) An estimate of the time required to prepare each comparison report and an estimate of time in which to re-examine a particular basin.

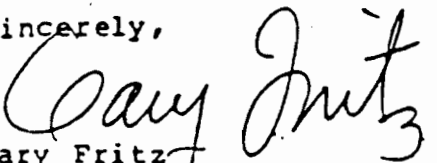


Honorable Judge W.W. Lessley  
Page 5  
August 18, 1987

Each comparison report is estimated to require an average of three weeks to prepare. For the respective field offices that would be responsible for work in the decreed basins, the amount of time estimated to re-examine each basin is shown in the attached table.

I trust this information is responsive. I look forward to working with you and your staff in the consultation process prior to a determination as to the need to re-examine the subject claims.

Sincerely,

  
Gary Fritz  
Administrator  
Water Resources Division

GF:rmc  
attachment

cc: Honorable J. A. Turnage, Chief Justice  
Honorable L. C. Gulbrandson  
Honorable John C. Harrison  
Honorable William E. Hunt, Sr.  
Honorable R. D. McDonough  
Honorable John C. Sheehy  
Honorable Fred J. Weber  
Honorable Bernard W. Thomas  
Honorable Robert M. Holter  
Honorable Roy C. Rodeghiero  
Larry Fasbender  
Larry Holman

ESTIMATED TIME REQUIRED TO  
RE-EXAMINE DECREED BASINS

(Listed by Field Office)

<u>FIELD OFFICE</u> <u>(PERSONNEL)</u>	<u>BASIN</u> <u>NO.</u>	<u>BASIN NAME</u>	<u>NUMBER</u> <u>OF</u> <u>CLAIMS</u>	<u>TIME REQUIRED</u>
Billings (1)	43EV	Sweet Grass Creek	711	9 months ( 0.8 years)
	43B	Upper Yellowstone River	4,750	70 months ( 5.8 years)
	43BJ	Boulder River	823	12 months ( 1.0 years)
	43QJ	Yellowstone River between Bridger Cr. & Clark Fork	1,048	10 months ( 0.9 years)
	43C	Stillwater River	1,716	25 months ( 2.1 years)
Bozeman (1)	41F	Madison River	2,775	39 months ( 3.3 years)
	41H	Gallatin River	5,680	83 months ( 6.9 years)
Glasgow (2)	40D	Big Dry Creek	2,922	13 months ( 1.1 years)
	40E	Missouri River between Musselshell & Ft. Peck	2,959	14 months ( 1.2 years)
	40N	Rock Creek	1,494	9 months ( 0.8 years)
	40L	Frenchman Creek	417	6 months ( 0.5 years)
Havre (1)	40G	Sage Creek	917	9 months ( 0.8 years)
	41N	Willow Creek	1,466	15 months ( 1.2 years)
	41K	Sun River	2,926	32 months ( 2.7 years)
Helena (2)	41U	Dearborn River	855	6 months ( 0.5 years)
	76G	Upper Clark Fork River	4,652	36 months ( 3.0 years)
	41E	Boulder River	1,203	8 months ( 0.7 years)
Kalispell (1)	76N	Lower Clark Fork	1,168	16 months ( 1.4 years)
	76C	Fisher River	233	4 months ( 0.3 years)
	76D	Kootenai River	1,384	20 months ( 1.6 years)
	76B	Yaak River	99	2 months ( 0.2 years)
	76I	Middle Fork Flathead R.	178	4 months ( 0.3 years)
	76J	So. Fork Flathead River	124	2 months ( 0.2 years)
	76K	Swan River	557	8 months ( 0.7 years)
Lewistown (2)	41S	Judith River	5,203	28 months ( 2.3 years)
	40A	Upper Musselshell River	5,643	32 months ( 2.7 years)

<u>FIELD OFFICE</u> <u>(PERSONNEL)</u>	<u>BASIN</u> <u>NO.</u>	<u>BASIN NAME</u>	<u>NUMBER</u> <u>OF</u> <u>CLAIMS</u>	<u>TIME REQUIRED</u>
Miles City	39G	Beaver Creek	694	6 months ( 0.5 years)
(1)	39FJ	Little Beaver Creek	973	10 months ( 0.8 years)
	39E	Box Elder Creek	2,439	25 months ( 2.1 years)
	39F	Little Missouri River	2,944	30 months ( 2.5 years)
	42K	Yellowstone River between Tongue & Powder rivers	1,448	14 months ( 1.1 years)
Missoula	76E	Rock Creek	708	6 months ( 0.5 years)
(2)	76GJ	Flint Creek	1,003	8 months ( 0.7 years)
	76M	Middle Clark Fork River	2,486	20 months ( 1.7 years)

Formula used to estimate time required to re-examine claims.

$$\begin{array}{r}
 \text{Years} = \frac{\text{ST claims}}{8 \text{ claims/day}} + \frac{\text{IR claims}}{2 \text{ claims/day}} + \frac{\text{DM claims}}{6 \text{ claims/day}} + \frac{\text{OT claims}}{2.5 \text{ claims/day}} \\
 \hline
 \frac{250 \text{ working days}}{\text{year}}
 \end{array}$$

The time required to complete re-examination is only an estimate, since extensive re-examination has not taken place previously, and because no re-examination with the new Supreme Court rules has been done.



MONTANA WATER COURTS  
STATE OF MONTANA

WATER JUDGES:

Upper Missouri River Basin  
Chief Judge W. W. Lessley  
PO Box 879  
Bozeman, MT 59715

Lower Missouri River Basin  
Judge Bernard W. Thomas  
PO Box 838  
Chinook, MT 59623

Clark Fork River Basin  
Judge Robert M. Holter  
Lincoln County Courthouse  
Libby, MT 59823

Yellowstone River Basin  
Judge Roy C. Rodeghiero  
PO Box 448  
Roundup, MT 59072

August 6, 1987

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AUG 7 1987

MONTANA DEPT. OF NATURAL  
RESOURCES & CONSERVATION

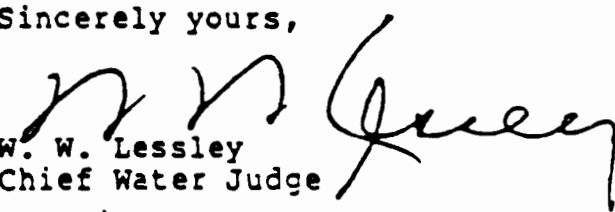
Gary Fritz  
Administrator  
Water Resources Division  
Mt. Dept. of Natural Resources and Conservation  
1520 E. 6th Ave.  
Helena, MT 59620

Dear Gary:

As you know, and the Order enclosed, deals now only with the Basins already examined by the Department under the previous examination procedures. Further the appropriate decree has not as yet been issued.

This Order of the Water Court concerns itself with that specific problem. This Order is a result of consultation with all the other Water Judges and considerable time and concern. Please act accordingly.

Sincerely yours,

  
W. W. Lessley  
Chief Water Judge

WWL/jl  
ENCL.

CC: Honorable J. A. Turnage, Chief Justice  
Honorable L. C. Gulbrandson  
Honorable John C. Harrison  
Honorable William E. Hunt, Sr.  
Honorable R. D. McDonough  
Honorable John C. Sheehy  
Honorable Fred J. Weber  
Honorable Bernard W. Thomas  
Honorable Robert M. Holter  
Honorable Roy C. Rodeghiero

Exhibit N

IN THE WATER COURTS OF THE STATE OF MONTANA  
\*\*\*\*\*

IN RE: RESUMING ISSUANCE OF BASIN DECREES  
AND ALLOWING MOTIONS FOR RE-EXAMINATION

\*\*\*\*\*

O R D E R

It is this Court's intent to proceed fully with the adjudication of pre-July 1, 1973 existing water rights as the Legislature has authorized and directed.

As part of the ongoing adjudication, it is now necessary for the Department of Natural Resources & Conservation to resume the claim examination activities performed under Section 85-2-243 MCA. Since July 15, 1987, this claim examination process has been governed by the Water Right Claim Examination Rules, issued by the Montana Supreme Court on July 7, 1987.

The issue remains, however, of the course to be followed in those basins already examined by the Department under the previous examination procedures, but not yet issued as the appropriate temporary preliminary or preliminary decree. The question is whether there is a need for these basins to be re-examined, either partially or wholly, under the new Water Right Claim Examination Rules.

The determination of whether any re-examination is necessary to a proper adjudication will be made by this Court, subject to review by the Montana Supreme Court. As the Supreme Court has recently stated:

"It has been suggested to us by counsel for the Washington Water Power Company and for the Montana Power Company, that the verification process that has been used heretofore is inadequate to insure accuracy in the water rights decrees and fairness to all claimants. These parties suggest that the new verification rules should be applied equally to all water rights claims, including those water rights claims which have been the subject of temporary preliminary decrees heretofore entered by the water courts.

As we have interpreted (Section) 85-2-243, MCA, and do now interpret it, the DNRC is required to 'conduct field investigation of claims that the water judge in consultation with the Department determines warrant investigation;....' It is clearly the statutory intent, that as to past verified claims or those to be verified under the rules now promulgated, DNRC may consult with the water judge about such verification but the final determination is to be made by the water judge. The role of DNRC is consultatory only. The DNRC, under (Section) 85-2-243, MCA, is 'subject to the direction of the water judge' in all matters pertaining to the adjudication of existing water rights."

Order Adopting Water Right Claim Examination Rules, page 2, (July 7, 1987) (Emphasis supplied).

The Department has recently informed this Court that legislative reductions in operating budget will drastically reduce the level of field office claim examination services and personnel, apparently by as much as two-thirds. Under these conditions it is logical that any substantial re-examination of claims will impact the examination of new basins.

On the basis of information provided by the DNRC, there are currently five basins in which the claim examination process under the previous "verification manual" has been fully completed but no decree has yet been issued. Those basins are:

1. Basin 40K - Whitewater Creek
2. Basin 43A - Shields River
3. Basin 40C - Musselshell River below Roundup
4. Basin 41G - Jefferson River
5. Basin 41C - Ruby River

These basins are essentially ready to be issued as the appropriate temporary preliminary or preliminary decrees. Any decision to re-examine these basins now, considering the DNRC's limited examination resources, should be made only where there is a clear necessity for such re-examination.

To assist this Court in determining the need for re-examination, it is hereby,

ORDERED, that the DNRC may, within 30 days from the date of this Order, prepare and file with the Water Court, a "Motion for Order to Re-Examine" in any of the five basins addressed by this Order. Any such motion shall be filed in accordance with the Montana Rules of Civil Procedure and Rule 1.II of the Water Right Claim Examination Rules, issued by the Montana Supreme Court, July 7, 1987.

FURTHER ORDERED, that any such Motion to Re-Examine shall include:

1. A precise and detailed explanation of any alleged deficiencies in the previous DNRC examination of claims under the old "verification manual."

2. A precise and detailed explanation of how such alleged deficiencies would be addressed and corrected by re-examination under the new Water Right Claim Examination Rules.

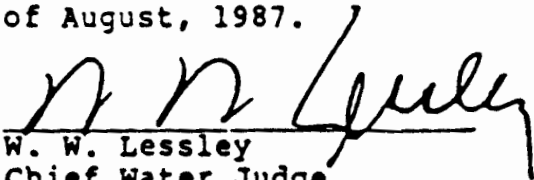
3. A reasonable, good-faith estimate of how long any such re-examination would take, and how many, full-time field office personnel would be committed to the re-examination efforts.

4. A precise statement detailing how any such re-examination efforts would affect the examination of new claims.

FURTHER ORDERED, that if no Motion to Re-examine is filed in a particular basin within the 30 day time frame, the Water Court will conclude that the DNRC could find no need to re-examine that basin.

FURTHER ORDERED, that the DNRC shall not take action to re-examine any claims in any basin without the express authorization and approval of this Court.

DATED this 6 day of August, 1987.

  
W. W. Lessley  
Chief Water Judge



DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

COPY

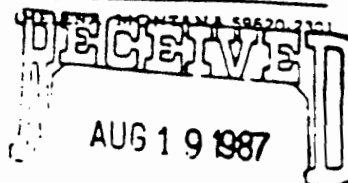


TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699



August 14, 1987

DEPT. OF JUSTICE LANDS DIVISION  
DENVER, COLO.

Honorable Judge W.W. Lessley  
Montana Water Court  
PO Box 879  
Bozeman, MT 59715

Dear Judge Lessley:

I appreciate the time that you and the other water judges spent in formulating the August 6, 1987 order regarding "Resuming Issuance of Basin Decrees and Allowing Motions for Re-Examination."

We will take every reasonable action to forward to you within 30 days (which we calculate to be September 8, 1987) the "comparison reports" on the five basins identified in your order. Given our reduced staffing, however, it may be impossible to meet that deadline. Be assured, however, that it is our intent to comply diligently with your order in preparing these reports.

While this Department appreciates the opportunity to file a "Motion for Order to Re-Examine" in any of these five basins, we must respectfully decline. We are anxious to complete the required "comparison report" for each of the five basins but feel that any "Motion for Order to Re-Examine" should come from claimants in these five basins or should be on the Court's own motion. These claimants (there are more than 15,000 claims in these basins) should have the opportunity to review our "comparison reports" and to petition the Water Court for re-examination.

Your order indicates that if the Department does not submit the subject motion within 30 days, then the Water Court would conclude that there is no need for re-examination. In declining to submit such motions, we do not conclude that re-examination is unnecessary, but that the claimants should review the "comparison reports" and decide if there is sufficient reason to present to the Water Court motions to re-examine or that the Water Court should determine on their own the need for re-examination.

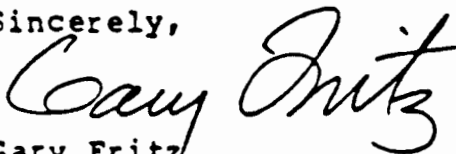
Honorable Judge W.W. Lessley  
Page 2  
August 14, 1987

We will not take and have not taken steps to re-examine claims in any basin without your direction. We have always recognized that, under terms of the Stipulation, any re-examination would take place only upon your authorization. Quite frankly, I am surprised at the adamant tone of your order in this regard, since this Department has never stated or implied that we would re-examine claims without your approval.

I have one other concern about your order. The Supreme Court Order, in adopting the water right adjudication rules, clearly states that those rules are intended to govern all claim examination activities of this Department. Yet your order of August 6, 1987, would indicate that in some instances the old verification rules might be applied and that in other situations the Supreme Court claim examination rules would be used, depending on how the Water Court reacted to motions for re-examination. Perhaps it would be appropriate for you and I to visit with the Supreme Court to inform them of this dilemma and ask their advice.

Once again, I would like to express this Department's commitment to diligently comply with your order to prepare the "comparison reports." I hope you appreciate that our reduction in staff limits our abilities to react quickly to all demands the Water Court places on us.

Sincerely,



Gary Fritz  
Administrator  
Water Resources Division

GF:rmc

cc: Honorable J.A. Turnage, Chief Justice  
Honorable L.C. Gulbrandson  
Honorable John C. Harrison  
Honorable William E. Hunt, Sr.  
Honorable R.D. McDonough  
Honorable John C. Sheehy  
Honorable Fred J. Weber  
Honorable Bernard W. Thomas  
Honorable Robert M. Holter  
Honorable Roy C. Rodeghiero  
Larry Fasbender  
Larry Holman

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59626-2301

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OCT 26 1987

September 4, 1987

DEPT. OF LANDS DIVISION  
HELENA, MONT.

Honorable Judge W.W. Lessley  
Montana State Water Courts  
P.O. Box 879  
Bozeman, MT 59715

Dear Judge Lessley:

In compliance with your orders of August 6 and August 19, 1987, enclosed are reports for the five basins mentioned in those orders (41G, 41C, 43A, 40K, and 40C). Note that the submission of these reports complies with the deadline of your August 6 Order and is two weeks ahead of the deadline given in your August 19 Order. The reports describe the significant differences between the Water Court verification manual used to review claims in these basins and the Supreme Court examination rules. Also, each report estimates the time that would be required for our current staff to re-examine the particular basin claims using the new claims examination rules.

You indicated in earlier correspondence that claimants in these basins should have the opportunity to submit to the Water Court "Motions for Re-examination." We are available to assist the Water Court in providing notice to claimants in these basins that these reports are available for their review, and that they have the option of submitting such motions. You might consider a notice similar in format to the notice accompanying decrees.

I trust these reports are responsive to your Orders. If not, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary Fritz".

Gary Fritz  
Administrator  
Water Resources Division

GF:rmc  
enclosures

Exhibit P

Honorable Judge W.W. Lessley  
Page 2  
September 4, 1987

cc: Honorable J.A. Turnage, Chief Justice  
Honorable L.C. Gulbrandson  
Honorable John C. Harrison  
Honorable William E. Hunt, Sr.  
Honorable R.D. McDonough  
Honorable John C. Sheehy  
Honorable Fred J. Weber  
Honorable Bernard W. Thomas  
Honorable Robert M. Holter  
Honorable Roy C. Rodeghiero  
Larry Fasbender  
Larry Holman



MONTANA WATER COURTS

STATE OF MONTANA

October 19, 1987

WATER JUDGES:

Upper Missouri River Basin  
Chief Judge W. W. Lessley  
P.O. Box 879  
Bozeman, MT 59715

Lower Missouri River Basin  
Judge Bernard W. Thomas  
P.O. Box 373  
Chinook, MT 59523

Clark Fork River Basin  
Judge Robert M. Moller  
Lincoln County Courthouse  
Libby, MT 59923

Yellowstone River Basin  
Judge Roy C. Rodeghiero  
P.O. Box 448  
Roundup, MT 59072

Gary Fritz, Administrator  
Water Rights Bureau  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620

Dear Gary,

Enclosed please find my Order denying  
re-examination.

We will carefully consider this Basin as we move  
forward in its adjudication phase.

Here we have the review copy available for Basin  
40C as your examination was finished. Further, one of  
our Water Judges, Judge Roy C. Rodeghiero, is most  
familiar with this Basin. I, as Chief Water Judge,  
have worked in and am familiar with this Basin.

Further, we shall work in close contact with the  
Lewistown Field Office during all the adjudication  
phase.

Sincerely yours,

*W. W. Lessley*  
W. W. Lessley,  
Chief Water Judge

WWL/cm  
encl.

cc: Honorable Jean A. Turnage, Chief Justice  
Honorable L.C. Gulbrandson, Justice  
Honorable John C. Sheehy, Justice  
Honorable Bill Hunt, Justice  
Honorable John C. Harrison, Justice  
Honorable Russell McDonough, Justice  
Honorable Fred Weber, Justice  
Justice/State Library Building  
215 N. Sanders  
Helena, MT 59620

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OCT 21 1987

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION

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OCT 26 1987

DEPT. JUSTICE  
BUTTE, MT.

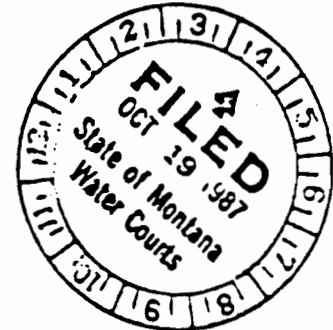
IN THE WATER COURTS OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MUSSELSHELL RIVER BELOW ROUNDUP BASIN (40C)

RECEIVED  
OCT 26 1987

DEPT. JUSTICE LANDS DIVISION  
DENVER, COLO.

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE )  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE MUSSELSHELL )  
RIVER DRAINAGE AREA BELOW ROUNDUP, )  
INCLUDING ALL TRIBUTARIES OF THE )  
MUSSELSHELL RIVER BELOW ROUNDUP IN )  
MUSSELSHELL, PETROLEUM, GARFIELD, )  
FERGUS AND ROSEBUD COUNTIES, MONTANA. )



ORDER - BASIN 40C

Basin 40C, Musselshell River Below Roundup, has been fully examined by the Department of Natural Resources and Conservation, (DNRC), under the procedures and methods set forth in the "Verification Manual". A "Review Copy" of the temporary-preliminary decree for this basin was printed by the DNRC and sent to this Court on November 14, 1985.

After this Basin's Review Copy was sent to this Court, the DNRC asserted its desire to adopt new examination procedures and methods pursuant to the Montana Administrative Procedures Act, (MAPA). This Court then issued two Orders, one dated July 23, 1986, and the other dated August 8, 1986, which prohibited the DNRC and the Board of Natural Resources and Conservation from adopting the examination procedures under the MAPA. The DNRC and Board appealed these Orders.

After briefing and oral arguments, the Montana Supreme Court issued its decision on March 31, 1987. The Supreme Court's decision affirmed the Water Court Orders in all respects.

Further, the Supreme Court held that under section 3-7-103, MCA, the power of rulemaking in this area resided with the Montana Supreme Court, and not the DNRC. In Re the Activities of the Department of Natural Resources and Conservation et al., MT \_\_\_, 44 St. Rep. 604 (Decided March 31, 1987).

Accordingly, this decision further ordered representatives of this Court and the DNRC to meet and draft proposed examination rules for consideration and possible adoption by the Supreme Court. The authorized representatives did meet and the proposed examination rules were timely submitted to the Supreme Court.

On July 7, 1987, the Montana Supreme Court issued an Order Adopting Water Right Claim Examination Rules, Cause No. 86-397. This Order stated that the new Examination Rules would become effective on July 15, 1987, and would be deemed temporary until March 15, 1988, and provided for a comment process.

Of particular importance here, the Supreme Court's Order further held that under Sec. 85-2-243, MCA, the Water Judges have sole authority to decide when a water right claim is to be examined impartially by the State. This includes the authority to determine whether those claims, which have already been examined under the "Verification Manual" procedures, should be re-examined under the "Examination Rules" adopted by the Supreme Court.

As the Montana Supreme Court stated:

"As we have interpreted Sec. 85-2-243, MCA, and do now interpret it, the DNRC is required to 'conduct field investigations of claims

that the water judge in consultation with the Department determines warrant investigation;....' It is clearly the statutory intent, that as to past verified claims or those to be verified under the rules now promulgated, DNRC may consult with the water judge about such verification but the final determination is to be made by the water judge. The role of DNRC is consultatory only. The DNRC, under Sec. 85-2-243, MCA, is 'subject to the direction of the water judge' in all matters pertaining to the adjudication of existing water rights."

Order Adopting Water Right Claim Examination Rules, July 7, 1987, Cause No. 86-397, pages 2-3.

By a letter to this Court, dated July 29, 1987, the DNRC has expressed its position that all claims, in all currently non-decreed basins, should be re-examined under the new Examination Rules. This includes those basins which have already been fully examined under the "Verification Manual" procedures, but not yet issued as a formal decree.

No other claimant or interested party has indicated a need or desire for re-examination.

In response to the DNRC's July 29, 1987 letter, this Court issued an Order on August 6, 1987, which addressed five basins already examined under the Verification Manual. This Order directed the DNRC to submit a "Motion for Order to Re-Examine" in any of the five basins where the DNRC felt re-examination was necessary. The purpose of that Order was to assist this Court in determining the necessity of any re-examination.

Specifically, the Order required any such Motion to include:

- 1) A precise and detailed explanation of any alleged deficiencies in the previous DNRC examination of claims under the old "verification manual".



2) A precise and detailed explanation of how such alleged deficiencies would be addressed and corrected by re-examination under the new Water Right Claim Examination Rules.

3). A reasonable, good-faith estimate of how long any such re-examination would take, and how many full-time field office personnel would be committed to the re-examination efforts.

4). A precise statement detailing how any such re-examination efforts would affect the examination of new claims.

The DNRC subsequently declined to submit any such Motions. The DNRC, by a letter dated August 14, 1987, took the position that any such Motion should come from some other claimant, or upon this Court's own Motion. The letter further stated that claimants in the five basins should be allowed to review a "comparison report" prepared by the DNRC and petition the Water Court for re-examination on that basis.

To assist the Water Court in determining the necessity for re-examination, and under the authority of Sec. 85-2-243, MCA, this Court issued a second Order on August 19, 1987. This second Order directed the DNRC to file a statement with this Court detailing any substantial differences between the claim examination procedures set forth in the Water Right Claim Examination Rules and those conducted in the five basins pursuant to the "Verification Manual". Further, the DNRC was ordered to estimate the time necessary for re-examination under the new Rules.

On September 8, 1987, the DNRC submitted statements entitled "Comparison Reports" for the five basins. Each of the five reports are essentially identical as to both form and substance.

After a careful review of the Comparison Report submitted for Basin 40C, Musselshell River Below Roundup, there is no apparent necessity sufficient to justify the costs of re-examining this basin.

First, although the DNRC's statement for this Basin lists numerous "substantial differences", this Court is not convinced that the differences are as great, or as substantial as the DNRC contends. The DNRC's report emphasizes increased authority to contact claimants and conduct field investigations as substantial differences. However, a careful and complete reading of the Verification Manual discloses many situations where the DNRC was already authorized to contact claimants. The increase in claimant contact under the new Rules does not appear to be substantial.

Concerning field investigations, the new Rules provide a formal process wherein, upon Water Court authorization, the DNRC may conduct a field investigation if it provides notice of the investigation to the claimant and the Water Court, and if the Water Court does not expressly prohibit a particular investigation. On this point, the Montana Supreme Court held: "The Water Court has the power and authority to control and terminate field investigations." Rule 1.II(9), Water Right Claim Examination Rules, (July 15, 1987).

Although there may be additional information gathered as a result of increased field investigations, such investigations do not necessarily have to be conducted before a decree is issued. It is clear that this Court may still order a field

p. 6 is  
missing

In evaluating the need to re-examine claims in this Basin, the time and money necessary to perform this task was of course given proper consideration. During the 1987 Montana Legislative Session, the DNRC supported and experienced a fifty percent monetary reduction to its adjudication related services. Partially as a result of this reduction, the DNRC now estimates that it would take 1.5 years to re-examine Basin 40C. This figure assumes that the appropriate DNRC field office will be performing no other work for the Court during that period of time. This delay in the examination of new basins is made more critical by the consideration that no new claim examination has been conducted in Montana since February, 1986.

It is this Court's decision that no claims should be re-examined by the DNRC absent a clear showing of necessity. The statement or "comparison report" submitted by the DNRC in this Basin, as well as this Court's own review of the contrasting procedures, has not demonstrated or supported the need to re-examine claims in Basin 40C.

Absent this showing of necessity, this Court cannot justify the costs in terms of time and money which would be required to re-examine this Basin.

Alleged deficient or erroneous claims in Basin 40C may still be objected to, and subjected to judicial scrutiny and review at that time. Further, many of the factual contradictions currently existing in Basin 40C, if not objected to, can still be reviewed upon this Court's own motion.

Accordingly, it is HEREBY

ORDERED that no member of the Department of Natural Resources and Conservation shall take action to re-examine any claim in Basin 40C under the Water Right Claim Examination Rules, without the express permission and direction of this Court.

FURTHER ORDERED that within 30 days from the date of this Order, the appropriate DNRC field office shall inspect the "Review Copy" for Basin 40C, and shall prepare a written list of all clerical or typographical corrections which the field office believes should be made prior to decree issuance. This list shall be sent to the Water Court's office in Bozeman as soon as it is completed.

This Order is issued with the concurrence and approval of the Honorable Robert M. Holter, Honorable Roy C. Rodeghiero and Honorable Bernard W. Thomas, Water Judges.

DATED this 19 day of October, 1987.

  
W.W. Lessley,  
Chief Water Judge

cc: Mr. Gary Fritz, Administrator  
DNRC Water Resources Bureau  
1520 East Sixth Avenue  
Helena, MT 59620

Honorable Jean A. Turnage, Chief Justice  
Honorable L.C. Gulbrandson, Justice  
Honorable John C. Sheehy, Justice  
Honorable Bill Hunt, Justice  
Honorable John C. Harrison, Justice  
Honorable Russell McDonough, Justice  
Honorable Fred Weber, Justice  
Justice/State Library Building  
215 N. Sanders  
Helena, MT 59620

APPENDIX VI

RESPONSE TO COMMENTS ON JULY 29, 1988 DRAFT REPORT  
TITLED  
"EVALUATION OF MONTANA'S WATER RIGHTS  
ADJUDICATION PROCESS"

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COMMENT OF THE MONTANA WATER COURT  
DATED AUGUST 9, 1988

The Final Report addresses this comment beginning at page 13.

COMMENTS OF THE MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS  
DATED AUGUST 17, 1988

Pages 1-2 -- Separation of Powers

1. The Montana Supreme Court held in In Re Matter of Activities of DNRC:
  - ° In the verification of claims DNRC has no independent executive discretion or authority.
  - ° DNRC had presented no factual record to demonstrate Water Court interference with DNRC's executive powers which may have been committed to its executive discretion by the Legislature.
2. DNRC's role in the verification of claims in the adjudication is as a fact finder for the judicial branch.
3. Since DNRC is powerless to exercise discretionary executive authority in its claims verification role in the adjudication, the Water Court's use of DNRC in a judicial role does not violate the separation of powers doctrine.
4. If the Water Court interferes with DNRC's discretionary executive functioning (e.g., in its roles as claimant or objector) or "interferes with its day-to-day activities," DNRC can make a factual record and prosecute an appeal.

Pages 2-3 -- Adequacy of Claims Examination

1. See Wright Water Engineers' report (Appendix I).



2. It is beyond the scope of the study to determine or to "substantiate" why free men do not avail themselves of a judicial opportunity to protect their rights.

#### Page 3 -- Variance in Verification Procedures

1. The ultimate logic of this comment appears to be that whenever any revision is made, all prior work must be redone. The law does not require such a result.
2. We found no legal significance to the variances in the procedures, not that they were "not significant." Legal significance connotes violation of substantive due process or equal protection of the laws -- application of different standards to similar individuals with no rational basis or in a discriminatory manner.
3. We observe that all of the "updates" to the verification procedures apparently were made with good reason, not arbitrarily and capriciously. These changes also were predominantly the result of DNRC recommendations.
4. If a claimant can demonstrate that changes in the verification procedures have resulted in the issuance of a decree depriving him of the right to which he is entitled, the judicial process affords him a remedy to correct the matter.

#### Page 3 -- Inadequate Notice

No response required.

#### Page 4 -- Water Court Efficiency

1. Both the Draft and the Final Report address the issue in the Study Design. The question of accuracy of decrees is addressed in other sections of the Draft and Final Report.

#### Pages 4-5 -- Water Court Constitutionality

1. We acknowledged the rationale of Mr. MacIntyre's analysis, but pointed out that a contrary analysis is at least as sound and is a good deal more pragmatic.
2. Either the Department or DNRC could, if they choose, seek judicial resolution (e.g. writ of prohibition) of this issue. It is an issue the Court, not the Legislature, should decide.
3. While the constitutional convention may have included impassioned speeches about the importance of electing judges, the 1972 Constitution provides for courts otherwise "created by law" in addition to the district courts manned by elected judges.

#### Page 5 -- Accuracy of Final Decrees

1. We interpret the Study Design differently than the Department does.

#### Page 5 -- Powder River Decree

No response required.

#### Page 5 -- Abandonment Presumption

1. The "subordination" of late-filed claims is simply an option, not a recommendation. The Legislature legally could ignore the plight of the "late filers."
2. The legality of incorporating late-filed claims with permit system rights has not been studied. The scope of the Study

Design does not include analysis of remedies for the legal effect of the conclusive presumption of abandonment.

Page 5 -- Accuracy Observation

1. The survey does not use the adjective grossly; that is a Department interpretation.
2. There is no substantiation for the proposition that "[t]he lawyers . . . fully understand the inadequacy of the Water Court's procedures." This is a Department conclusion which criticizes not the Court system, but the judiciary. The objectivity of our study has not been affected by the views of some members of the Bar. Their views are useful but not dispositive on any of the institutional issues we studied.

COMMENTS OF DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
DATED AUGUST 17, 1988

Pages 1-3 -- General Comments

1. Our charge was to offer the Committee recommendations of remedial measures, if required, which in our judgment provide legally effective institutional options short of another massive overhaul of the adjudication procedure.
2. The Study Design calls for us to recommend legislation, not guarantee its passage. DNRC suggests that because we cannot guarantee that our recommendations for remedial measures on renote and historical use tests will be enacted we should have not suggested a remedial approach but should have recommended starting the entire adjudication process over. No recommendation for legislative change is 100% guaranteed of passage in any democratic forum.
3. Our suggested remedy goes to historical use, not priority dates. The stale facts concerning priority dates are a price for having delayed the general adjudication of rights for over 100 years. DNRC and others have not indicated great factual concerns with priorities anyway, only with amounts of diversion and irrigated acreage.
4. The availability of adequate judicial remedies is the essence of legal adequacy of any judicial procedure. If, as a matter of policy, the legislature were to determine that requiring a claimant to pursue judicial redress is "callous," the Legislature could, as a matter of policy, ease that blow at taxpayer expense. "Fairness" as a concept is different from due process and legal sufficiency. By analogy, is it "fair" that Montanans must verify the

accuracy of their property tax assessments and appeal any errors through a judicial process? Is it "fair" that Montanans must avail themselves of judicial remedies to oppose land zoning decisions? Policy is a matter for the legislature to decide upon after reviewing this report.

Pages 3-4 -- Comment 1

1. The Final Report sets forth more fully the reasoning suggested in the Draft.
2. See the responses at page VI-3 above concerning the separation of powers issue.
3. The Montana Supreme Court has held that DNRC in performing its verification role has no independent (executive) authority or discretion in the adjudication process.
4. Given that prior Court decision, and DNRC statutory duty to perform a fact finding role for the Court, the question becomes whether the Water Court is attempting to control DNRC in its exercise of other powers granted it by the legislature. We found no evidence of such attempts. The Water Court's "control" of DNRC has been limited to the confines of DNRC's role as a fact finder in the adjudication. Moreover, if there should develop any intrusion by the Water Court into matters committed by the Legislature to DNRC's executive discretion, we are satisfied that the Montana Supreme Court could be expected, on the basis of a factual record demonstrating such an intrusion, to correct the problem.

Pages 4-5 -- Comment 2

1. See Wright Water Engineers' report (Appendix I).

Pages 4-8 -- Comment 3

1. The central thrust of DNRC's concern again is "fairness" in a policy context.
2. The time compression of expediting the adjudication of 100 years of appropriative experience inevitably highlights changes (improvements) in procedures that would not be as noticeable if the adjudication spanned the history of appropriative rights in Montana. The rapidity with which the Montana system has evolved, not the fact of its evolution, is the central reason for the concern expressed by DNRC. Technology and process will invariably evolve and not remain static.
3. The Final Report has been modified to amplify our reasoning.

Pages 8-9 -- Comment 4

1. DNRC makes a valid point about the Water Court's past practice of internalizing its records concerning changes to decree drafts. Awareness of how the Water Court has or has not changed a claim may be interesting, but such knowledge is not essential to the objection process. Claimants know from the abstract of their claim if the Court has changed their claim. Those concerned with claims of others should conduct their own investigation and cannot and should not rely simply on the fact that a claim was changed or not changed by the Water Court in deciding whether to file an objection.

Pages 9-10 -- Comment 5

1. The legal sufficiency of the adjudication process is not impaired by failure to provide notice to those who have

chosen not to be parties to an individual claim proceeding of the pendency of precedent setting issues in that proceeding. The traditional method of keeping track of such proceedings is to become a party thereto. Should the legislature decide, as a matter of policy, that providing such a service to the public is desirable and that the cost of such a program is acceptable, it could provide for such a program without impairing the process.

Pages 10-11 -- Comment 6

1. Even a 100% accurate, final decreed water right should be subject to historical use inquiry if it is changed in the future. The decree reflects maximum draft on the river, not the average amount needed or used year-by-year in the exercise of the water right.
2. Whether to spend the time and money up front for a "Cadillac" adjudication, when many or most of the water rights will not be administered for years, if at all, or to address enlarged use on a case-by-case basis when and if users attempt to enlarge their ditch (to divert their maximum "paper" decree), lengthen their ditch (to irrigate "paper" acreage), or change their rights to new uses is a policy judgment. The recommended remedy places the economic burden of addressing enlarged use problems, if it ever becomes necessary, on the water users seeking to gain from such an enlargement of use on the case-by-case basis rather than having that burden born by the Montana taxpayers generally.
3. If final decrees contain substantive errors, affected persons will have to "live with" those problems. Finality is a principle which has virtues and burdens.

1. We agree with DNRC that no federal standards of accuracy for the adjudication of water rights have ever been enunciated. McCarran does not deal with accuracy as an issue for either federal claims or for the rights of state claimants. The only discernable "federal standard" under McCarran is whether the state proceedings are "adequate to resolve federal claims." There is little federal or state case law guidance on what that means. The U.S. Supreme Court has upheld both Colorado's old "general" adjudication scheme and its newer "ongoing" adjudication process. Neither of those processes involve(d) the automatic, extraordinary detailed factual inquiry into all claims which is a part of the Montana process; such scrutiny occurs in Colorado only when other users appear and participate in the adjudication, which occurs in about 14% of the cases.
2. A careful review of federal case law, including Wyoming v. Nebraska, reveals the total absence of any judicial authority supporting any standard at all, much less the 10% figure attributed to Frank Trelease in the comment.
3. The remainder of the comment is addressed in the Final Report. It should also be noted, however, that the remainder of the comment deals largely with concerns DNRC seems to have about how the Water Court will perform in its role, not with what the Court's role is or should be. As we have pointed out elsewhere, the Water Court system provides ample opportunities for anyone, whether claimant or objector, to have his day in Court to protect his property interest and to have any judicial error affecting that interest corrected, if necessary. The policy alternative would be to provide a "mandatory adversary" at state expense, if the State of Montana wants to take on the burden of assuring



its water users that their interests will be protected by the State.

Pages 13-15 -- Comment 8

1. Whether to "protect" all users' interests through a state-funded adversary or to require users to inquire into the claims of senior rights is a policy decision. Certainly, a mandatory adversary could be expected to increase the level of accuracy if accuracy were made a contested issue.

Pages 15 -- Comment 9

1. By operation of Montana statutory law, no adjudication decree is "final" unless it incorporates or disposes of federal and Indian claims. The Study Design focused only on the question of the finality of the Powder River decree.

Page 15 -- Comment 10

1. We do not dispute the accuracy of DNRC's estimation of decreed claims. Our estimate of 103,000 claims being "in process" was derived from Water Court interviews and was stated with no intent to mislead anyone. DNRC's numbers are comparable with our understanding of approximately 103,000 being "in process" -- 69,592 decreed claims plus 35,509 examined claims equals 105,101 claims.

Page 16 -- Comment 11

1. We do not dispute the applicability of the Rules of Civil Procedure and Evidence to the Water Court process, and our findings should not be interpreted to imply that those Rules should not be applied.

2. We find no pattern of Water Court activity designed to deprive litigants of the benefits of those Rules.

Page 17 -- Comment 12

1. We found no institutional impediment to the processing of whatever federal and Indian reserved right claims may require the Courts' attention after the completion of the compacting process. What changes in claims examination rules, if any, may be required to handle those claims can be dealt with by the Court then.

Page 17-18 -- Comment 13

1. The Final Report addresses this concern.

Page 18 -- Comment 14

1. Finality of the judicial confirmation will be both useful and burdensome.

Page 18 -- Comment 15

1. Montana law currently provides a limited mechanism to correct or amend substantive judicial errors pursuant to Rule 60(b), M.R.C.P.
2. DNRC's comment mixes up clerical and substantive error. As stated in the Draft, if the decree as entered is erroneous, as evidenced from the record (e.g., the claim, transcript, etc.), it may be a clerical error. Thus, a point of diversion might be decreed to be several miles downstream from the actual location evidenced by the claim or other evidence. A user reviewing that claim in a preliminary decree might not object to it based upon its decreed location. A

correction to the actual diversion, then, on paper would alter the diversion and return flow, perhaps to the apparent detriment of other users. If the error is so substantial that other users could be said to have been misled, the jurisdictional basis for the final decree is questionable.

Page 19-20 -- Comment 16

1. See responses at pages VI-5 and VI-6 above concerning abandonment presumption.

Pages 20-21 -- Comment 17

1. DNRC is correct in pointing out the Water Court's use of standards for flow rates. The Final Report has been revised to reflect that clarification.
2. DNRC examines claims as a judicial function, and it is within the discretion of the Water Court to decide how to make findings on the facts that it gathers through DNRC or otherwise.
3. "Gray area remarks" permit potential objectors to "issue spot" preliminary decrees. Thus, the Water Court has put the burden on other users and DNRC to object to such claims. This is not unsound.
4. The essence of DNRC's comment seems to be that its verification information should automatically rebut the prima facie evidence value of a claim. We are not convinced that result reflects legislative intent, nor is it required for a legally sufficient result.
5. The "useful purpose" of a prima facie claim during the pendency of the adjudication extends to the potential uses of

the claim beyond the adjudication, such as in the sale or mortgage of property and, potentially, in district court administration of undecreed rights.

Page 21 -- Comment 18

1. The administrative possibility mentioned by DNRC is a good one, and was considered to be obvious. The Final Report has been revised to reflect such an option. Proposed legislation appears in Appendix IV.

Pages 21-23 -- Comment 19

1. We are unaware of any dismissal of the subject litigation. Therefore, the litigation "resolved" by the stipulation appears to be still pending before the Supreme Court so that DNRC or others unsatisfied with the implementation of the stipulation can press for its express approval or resume litigation of the issues.

COMMENTS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
DATED AUGUST 17, 1988

Pages 2-20 -- Separation of Powers

1. See Responses at pages VI-3 above concerning this subject.
2. The Final Report has been modified to amplify our analysis.

Pages 20-22 -- Accuracy of Decrees

1. See the Final Report and our responses at pages VI-6 and VI-10.
2. See Wright Water Engineers' report (Appendix I).

COMMENTS OF THE WATER POLICY COMMITTEE STAFF

DATED AUGUST 18, 1988

In the Final Report, we have addressed each of these comments, which focused on the adequacy of the scope of the Draft Report compared with the study design.